THE MODERN LAW REVIEW

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IN presenting this last number of the first volume of the MODERN LAW REVIEW the Editorial Board and Committee take the opportunity to thank all those who have assisted them whether by contributions or subscriptions. The reception accorded to the REVIEW has been favourable and the support quite as good as could be expected for a new venture. If a similar growth can be achieved during the next year the future should be assured.

The Committee are conscious that they have not been able so far to achieve a number of their objectives. It has not proved easy to obtain contributions in the border territory between law and economics, sociology, political science, and the other fields of study with which we are hoping to collaborate. This indicates that there is a paucity of workers in this field, but we have reason to believe that increasing attention will be paid to it, and are not without hopes of eventually fulfilling our ambitions along these lines. We may add that we shall always be grateful for any suggestions or criticisms which any of our readers may be pleased to send to us.

We are glad to say that the following articles have been secured for the next number—

THE NATURE OF TORTIOUS LIABILITY. By Professor A. L. GOODHART, D.C.L., LL.D.

LEGISLATION RESULTING FROM THE LAW REVISION COMMITTEE'S REPORTS. By John G. FOSTER, Secretary to the Committee.

A PLEA FOR UTILITARIANISM. By W. IVOR JENNINGS, LL.D.[1]

May we appeal to all who have helped during the past year to renew their support in the future.

[1] An index to Volume I will be issued with this number.

THE POSITION OF THE INJURED THIRD PARTY

THE recent Report of the Departmental Committee on Compulsory Insurance[1] draws attention once more to the tendency in road traffic legislation to place legal burdens on one section of the community for the benefit of another. It leads one to inquire whether this legislation has been effective to solve the problems it was designed to solve and how far it is correct in principle.

This body of legislation grew *pari passu* with the enormous increase in the quantity and speed of road traffic. It may not be unhelpful therefore to note the manner of its growth by looking at some of these characteristic measures which have been adopted to deal with the evils which are apparently inseparable from modern road use.

Twenty years ago, before the day of the horseless carriage, some 25,000 accidents involving personal injury occurred each year on the roads of Great Britain. Since then, concomitantly with the expansion of mechanical transport, this figure has been multiplied tenfold.[2] Many of the victims of the occurrences are potential litigants, and so the emergence of this vast road accidents problem has been of especial significance in relation to the law.

It has produced several noteworthy results. Amongst these are an enormous increase in actions at law arising out of road accidents; considerable development of the law of tort, including the introduction of new heads of claim for damages; a widening of the scope and complication of the nature of the business of voluntary insurance and its relevant law; the imposition by statute of compulsory insurance; and the radical alteration of some of the old rules of law.

The series of legislative steps which have been taken in attempting to secure that no wronged road user shall be left without a remedy in recoverable compensation have not been completely effective. The recent Report already mentioned shows this. Before referring more particularly to its recommendations it would be advisable to mention some of the important steps which preceded it.

Up to 1930 the victims of road accidents were confronted not only by the burden of proof of negligence, which is still theirs,

[1] Cmd. 5528.

[2] *Road Accidents Involving Personal Injury*, a Return issued by the Home Office on 22nd March, 1937: Parliamentary Paper, No. 89 of Session 1936–7.

but also by the risk that the tortfeasor who had injured them might prove to be insolvent, uninsured, inadequately insured, or insured with an insolvent insurer.

Two legal decisions in 1927 and 1928 made clear the need for legislation on some at least of these matters. In *Re Harrington Motor Company Limited, Ex parte Chaplin*[3] an injured third party had recovered judgment for damages and costs against a limited company, but before execution could be levied the company went into liquidation and the insurance company with whom the company in liquidation was insured against third party risks paid the amount of the damages and costs to the liquidator. It was held by the Court of Appeal, affirming Eve, J., that the injured third party had no right at law or in equity either as against the insurance company or as against the liquidator to require that the money so paid should be handed over to him, but that the money formed part of the assets of the company in liquidation, available for distribution among its general creditors in the winding up, including the applicant.

Hoods Trustees v. *Southern Union General Insurance Company of Australasia Limited*[4] was a decision based upon similar principles which may in their result be put this way. If A, being entitled to indemnity from an insurer, B, in respect of his liability to C, incurred bankruptcy, receivership, liquidation, or other similar crystallization of insolvency, B's liability to A was totally independent of A's liability to C, with the consequence that A's creditors benefited to C's resultant detriment, he becoming a mere unsecured creditor for his damages.

Shortly after these two cases, the Third Parties (Rights Against Insurers) Act, 1930,[5] was passed, to confer on third parties rights against insurers of third party risks in the event of the insured becoming insolvent and in certain other events. The result of the Act was this. Upon the happening of certain specified events which may be, perhaps, here compendiously typified by the term "insolvency," A's rights against B under the insurance policy shall be transferred to and vest in C, to be enforced by him directly for his own advantage. In this respect the Third Parties Act may rank merely as one amongst several enactments intended to alleviate the lot of injured third parties. Its especial significance lies in its recognition of a new principle, enabling a stranger to take the benefit of a contract to which he is a stranger, by a kind of statutory subrogation. The rule that only a party to a contract

[3] [1928] 1 Ch. 105.
[4] [1928] 1 Ch. 793.
[5] 20 & 21 Geo. V, c. 25.

may sue upon it is one which, with certain apparent modifications, is well founded and of long recognition.[6] Not all may subscribe to its logic, and, indeed, the Law Revision Committee in their latest Report[7] propose its removal on the ground that it runs counter to commercial usage. Yet the innovation introduced by the Third Parties Act lies beyond the arguments upon which the Committee's recommendation is based, and represents the first of a series of important interferences with the contractual freedom of insurers in the name of injured third parties. These are to be found in the Road Traffic Acts, 1930 and 1934.[8]

Part of the purpose of the Road Traffic Act, 1930, as expressed in its preamble, is "to make provision for the protection of third parties against risks arising out of the use of motor vehicles." This end it sought to achieve in three important ways. First, it imposed new and more stringent obligations upon motorists and others regarding the use, construction, and driving of motor vehicles brought on to the roads. Whilst breach of these does not necessarily carry any automatic civil consequence,[9] it adds weight to legal proceedings brought by one who suffers injury therefrom.[10] Secondly, it introduced that code of highway manners known as the Highway Code, which, though without precise signification in law, is constituted by statute to be presumptive evidence for or against negligence according as it is disregarded or observed. The Highway Code applies, of course, to all road users of whatever category; nevertheless the motorist is, as he must inevitably be, most closely affected by it, and to this extent, therefore, his positive obligations are increased. Thirdly, it set up a system of compulsory insurance. As from the first of January, 1931, it became unlawful for any person to use, or cause or permit any other person to use, a motor vehicle on a road unless there was in force in relation to the use of that vehicle by that person or that other person such a policy of insurance as complied with certain specified requirements. With the broad exceptions of liabilities under contract[11] to gratuitous passengers and to workmen in the course of their employment by the insured, these requirements were that the policy should insure the persons specified in it against any liability for the death of or personal

[6] *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Dunlop* v. *Selfridge*, [1915] A.C. 847.

[7] Cmd. 5449.

[8] 20 & 21 Geo. V, c. 43; 24 & 25 Geo. V, c. 50.

[9] *Phillips* v. *Britannia Laundry Co.*, [1923] 1 K.B. 539; [1923] 2 K.B. 832.

[10] In *Malfroot* v. *Noxal*, 51 T.L.R. 551, a firm of motor repairers was held liable in tort for an injury due to its inefficient repair inducing the owner of a vehicle to use it in an unsafe condition.

[11] I.e. contractual liabilities, not liabilities in tort which are concurrently breaches of contract.

injury to any person, arising out of the use of a motor vehicle on a road.

The adoption of this principle of compulsory insurance has resulted in three developments, the two most serious of which were foreseen and combated at the time by the opponents of compulsory insurance, all of which are distinctly favourable to the injured third party.

First, in creating a positive statutory duty to insure for the protection of any person who might be injured (notwithstanding that insurance is a protection to the person *liable* against the monetary value of his liability), the Act supplemented the injured person's claim for damage in respect of injury with a further right of action, founded on breach of the Statute alone, for damage in respect of inability to recover his damages for injury owing to the non-existence of a valid insurance policy.[12] In this way, even before obtaining a final judgment against the actual wrong-doer[13] he may possess a right against some other person whom he could never have sued at all but for his having caused or permitted the use of a motor vehicle without the necessary insurance protection.[14]

Secondly, notwithstanding the persistence of that well-established rule of practice[15] at the Bar which prohibits disclosure in court of the existence or non-existence of insurance covering the subjects of litigation,[16] there can be no doubt that, bringing with it the certitude that defendant motorists *are* insured against third party risks, compulsory insurance has helped to promote a striking rise in the general level of damages awarded in "running-down" actions, which is wholly favourable to injured third parties. Incidentally this same fact naturally produces a greater willingness amongst insurers to bargain for settlement out of court, with consequent advantage in the same direction. It may be, of course, that this represents a movement towards equity from a previous situation in which damages were too low and recovery too difficult; but this is a matter of opinion which is not germane to the present theme.

Thirdly, finally, and most important of all, the principle of compulsory insurance has, of its own impetus, necessitated

[12] *Monk* v. *Warbey & Ors.*, [1935] 1 K.B. 75; *Richards* v. *Port of Manchester Insurance Co. and Brain* (1935), 50 Ll.L.R. 132.

[13] An interlocutory judgment only was sufficient in *Monk* v. *Warbey* (*supra*).

[14] A person who causes or permits another to use his vehicle does not necessarily incur the liability of a principal, in spite of *Parker* v. *Miller* (1926), 42 T.L.R. 408.

[15] *Gower* v. *Hales*, [1928] 1 K.B. 191.

[16] In *Jones* v. *Birch Bros.*, [1933] 2 K.B. 597, Scrutton, L.J., regarded the rule as unaffected by the Road Traffic Acts.

considerable inroads into the privity of contract between insurer and insured. This is an aspect which deserves considerable study.

From the recognition by the Legislature that in order to prevent the defeat, in certain cases, of the properly ascertained claims of injured persons to recover their damages, all motorists ought to be compelled to insure, three or more results necessarily follow, namely, the insurance to be effective must be wide enough and valid enough to cover the circumstances of liability; the insurance policy must present undoubted security equal to its face value; and adequate machinery must exist to see that all motorists *do* insure. The last of these considerations is a matter within the sanctions of the penal law; the first two essentially involve some restrictions on freedom of contract between insured and insurer, restriction on the insured's right to effect his policy with whom he may select, and on such terms as he and his insurer may choose, and on the insurers right to rely on those terms. The Act of 1930 failed in its purpose because it was deficient in each of these respects. It did not prevent insurers from restricting the scope of the cover or the circumstances of its application or even avoiding the policy in certain events.

The Act of 1930 contained only one instance of interference in the insurance contract, namely, Sect. 38. This Section enacted that any provision in a policy providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall be of no effect as regards compulsorily insurable liabilities. Consequently a policy no longer proves inapplicable because notice of the accident was given out of time, or because the insured admitted his fault to a third person[17] or because the insured impeded the insurers in their conduct of the defence, although the policy is still itself enforceable only in terms of its arbitration clauses, which are not affected.[18] Beyond this, however, an insured may find himself without protection if, for example, some basic element of his contract has failed, such as identity of the vehicle[19] or insurable interest,[20] or he has committed a breach of some condition operative *before* the event, such as good faith,[21] or again if the vehicle was being used by a person or in a

[17] *Tustin* v. *Arnold & Sons* (1915), 31 T.L.R. 368.
[18] *Jones* v. *Birch Bros.*, [1933] 2 K.B. 597.
[19] *Rogerson* v. *Scottish Automobile and General Insurance Co.* (1931), 46 T.L.R. 573; 48 T.L.R. 17.
[20] *Coles* v. *Young* (1929), 33 Ll.L.R. 83.
[21] *Dunn* v. *Ocean Accident and Guarantee Corporation* (1933), 50 T.L.R. 32.

manner not permitted by the policy.[22] In any case, by the 1930 Act, the third party obtains no rights whatever against the insurers, and even should he be able to invoke the Third Parties Act, or to attach the insurers liability as a debt in garnishee proceedings, the rights so acquired by him do not surpass those of the insured himself.

The Road and Rail Traffic Act, 1933,[23] was by sect. 33 chronologically the next relevant statute but for the purpose of the present argument we may pass on to the Road Traffic Act, 1934.[24] This measure was designed to cure the defects of the 1930 Act, with which it is to be construed. It greatly increased the rights of the injured third party. By sect. 12, it took away insurers' rights to rely, as against third parties, upon eight specified types of condition, stipulation or proviso commonly found in motor insurance policies so far as they "purported to restrict the insurance of the persons insured thereby." The effect of this form of wording was to leave untouched such terms of the kind specified as *annulled* the policy and did not merely restrict it, i.e. conditions in the proper sense.[25] This aspect, however, was covered by sect. 10 of the same Act, which presents one of the most radical derogations of private contractual rights yet enforced by statute in the interests of one section of the community. This section enacted, in effect, that if an injured third party, claiming within the purview of the Road Traffic Acts, obtained a final judgment against any person insured by a policy in respect of a liability "covered by the terms of the policy," the insurers should forthwith be liable to pay the amount of the judgment, including costs and interest[26] notwithstanding that they were entitled to avoid or cancel the policy. This remarkable addition to the rights of the third party—whose action against the insurers could henceforth be founded on the words of the statute alone—was made subject to but one modification, namely that the insurers were to be entitled to seek a declaration from the Court that apart from any provision contained in the policy they are entitled to avoid it on the ground that it was obtained by non-disclosure of a material fact or by a representation of fact which was false in some material particular.[27] Moreover, not only is this apparent saving clause of doubtful practical use, but in any case the onus

[22] *Gray* v. *Blackmore*, [1934] 1 K.B. 95; *Jones* v. *Welsh Insurance Corporation Ltd.* (*The Times*, 22nd October, 1937).

[23] 23 & 24 Geo. V, c. 53.

[24] 24 & 25 Geo. V, c. 50.

[25] See *Behn* v. *Burness* (1863), 3 B. & S. 751.

[26] Ability to award interest as an item of damages at the discretion of the Court was afforded by the Law Reform (Miscellaneous Provisions) Act, 1934.

[27] See s. 112 of the 1930 Act for a definition of "material fact" for this purpose.

on the insurers, namely to show the policy actually to have been *obtained* by the breach of good faith is incomparably greater than that previously borne by them in alleging such a breach,[28] more especially since they are unable to plead any of the usual contractual additions to the implied duty.[29]

The failure of a number of insurance companies transacting compulsory motor vehicle insurance business inflicted grave hardship on many injured third parties and resulted in the passing of the Assurance Companies (Winding Up) Act, 1933, and the Assurance Companies (Winding Up) (Amendment) Act, 1935, granting wide powers of government inspection.

Further advances in the rights of injured third parties and their representatives which it is unnecessary to do more than mention here in passing were made by the Law Reform (Miscellaneous Provisions) Act, 1934,[30] and the Law Reform (Married Women and Tortfeasors) Act, 1935.[31] As a result of these the rule *actio personalis moritur cum persona* is practically obsolete; it is no longer necessarily more advantageous financially for a tortfeasor to kill rather than maim his victim; moreover, the tortfeasor can no longer by his own death defeat his victim's claim; there is now contribution between joint-tortfeasors; and rules of law founded in many instances on archaic authority rather than reason are brought nearer to reality.

Notwithstanding all this it has been found that the rights of injured third parties are not yet completely safeguarded, and circumstances still remain in which they may be unable to recover from an insurer damages to which they have become entitled by the fault of a motor vehicle user. Such circumstances include—

1. The particular risk may not be covered by insurance because the motorist has failed to comply with the effective and permitted conditions of his policy.[32]

2. The insurers may be entitled to obtain a declaration of avoidance on the ground of material misrepresentation or non-disclosure.

3. The motorist may be uninsured for other reasons.

4. The insurers may be unable to meet their liability.

5. The wrongdoer may be unknown and untraceable.

[28] Disclosure of a material fact need not have the extreme effect of persuading insurers not to issue a policy. They might merely impose special terms. Yet the mere fact of it having been withheld might well have been enough to cause them not to issue a policy, had they known of the withholding.

[29] I.e. "express" good faith. Cf. *Mackay* v. *London General Insurance Co.* (1935), 51 Ll.L.R. 201; 79 Sol. Jo. 271.

[30] 24 & 25 Geo. V, c. 41.

[31] 25 & 26 Geo. V, c. 30.

[32] *Jones* v. *Welsh Insurance Corporation Ltd.* (*The Times*, 22nd October, 1937).

These were amongst the problems presented to the Departmental Committee on Compulsory Insurance which was appointed on the 6th February, 1936, to consider and report whether any, and if so what, changes in the existing law relating to the carrying on of the business of insurance are desirable in the light of statutory provisions relating to compulsory insurance against third party risks and by employers against liability to their workmen.

The Report,[33] recently published, of this Committee, made some very important recommendations which, for reasons of space, can be only very briefly mentioned here. It first considered the question of solvency of insurers and recommended that no insurer should be permitted to undertake any branch of compulsory insurance business unless licensed to do so by the Board of Trade, and that a Central Fund be constituted as a second line of defence to meet the contingency of the insolvency of such a licensed insurer. Later it dealt as defences by insurers and failure to insure, with, *inter alia*, the points mentioned above. It recommended that no conditions in a policy should be effective as against an injured third party except those specified in Appendix III; that an insurer should not be entitled to repudiate liability to the detriment of an injured third party on the ground of a breach of any of the permitted conditions without obtaining a declaration by the Court that such breach has been established with consequential provisions for recovery from the Central Fund. It recommended that the right to avoid the contract of insurance on the ground of material misrepresentation or non-disclosure after obtaining a declaration of the Court should be retained, and that where a policy was so avoided the injured third party should have a right to recover from the Central Fund the amount of any judgment given in his favour against the offending motorist. It also recommended that in the case of total failure to insure an injured third party who has obtained a judgment should be able to recover from the Central Fund.

If these recommendations are implemented it would seem that they may go far towards impairing the bases upon which the contract of insurance is built at present. As a legal agreement, perhaps, its fundamental feature is *uberrima fides* on both sides. As a business agreement it essentially rests on a variety of facts without the incorporation of which it would be impossible to carry on the insurance business at all. To pursue the interests of third parties in total disregard of these important features would have defeated its own purpose. Thus the Committee have found themselves obliged to specify, in Appendix III of their

[33] Cmd. 5528.

Report, certain "permitted conditions" upon which insurers may rely, and which cover grounds similar to those at present available under existing legislation. They are—

1. As regards use—a condition excluding—

(1) Use for business purposes except by the insured (or some named individual) in person.

(2) Use for business purposes other than the business purposes of the insured.

(3) Use for the carriage of goods or samples in connections with any trade or business.

(4) Use for hire or reward.

(5) Use for organised racing and speed testing.

(6) Use, in the case of a public service or goods-carrying vehicle, for a purpose not permitted by the licence under which the vehicle is operated.

(7) Use of a motor-cycle without sidecar being attached.

2. As regards driving—a condition—

(1) limiting driving to—

(*a*) the insured or any person driving with the permission of the insured, permission being assumed if it can be inferred in the circumstances;

(*b*) the insured or persons employed by the insured;

(*c*) a named person or persons.

(2) excluding driving by—

(*a*) a named person or persons;

(*b*) a person whose driving licence has been suspended (during the period of suspension) or a person who is disqualified from obtaining a driving licence.

(3) A condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot, or civil commotion.

Apart from the matters just mentioned, it may be noted that there are two ways in which the recommendations of this Committee, if made effective, would impair the ability of the insurers to escape liability. First, instead of the onus of bringing his claim within the general limits of the policy, resting as heretofore *prima facie* upon the insured,[34] it would in future apparently rest upon insurers, seeking to set up a "permitted" condition between themselves and their insured, to adduce positive proof to the contrary; and secondly, such proof would need to be crystallised

[34] *Nobel's Explosives Co.* v. *British Dominions General Insurance Co.*, [1918] W.C. & Ins. Rep. 106.

into a declaration that the insurers are entitled to do so before reliance may be placed upon such a "permitted" condition.

Yet even in the few cases in which reliance upon such a condition is permitted, specific (and costly) proposals are submitted to take care of the third party. A Central Fund is to be set up, being a corporate entity capable of suing and being sued, against which the injured party shall be entitled to claim any damages which he is unable to recover owing to the invalidity of an insurance policy. The Fund, in turn, is to enforce for its own benefit whatever rights of recovery may exist against the insured, for his contractual breach, and against third parties, as joint or independent tortfeasors with the insured. Whatever the insurance companies may think of this proposal—for which they are to pay —lawyers will view with concern the sea of litigation which it opens in prospect. Nowadays if A is injured by B, B's insurers C, unless a cast iron case exists by B against A, or by themselves against B, will negotiate at once for an expeditious settlement, whilst C's reinsurers will follow the fortunes of C automatically. One may suppose that the existence of positive, permitted conditions will lead insurers to greater temerity in relying on them, knowing as they will do, of the Central Fund. Thus, C sues B to obtain a declaration of reliance upon such a condition. A sues B and obtains judgment, without which he cannot proceed against the Central Fund. He then goes against the Fund and may have to sue it also. The Fund then sues either the insured for his breach of condition, to which B may apparently reply that breach of contract between him and C has nothing to do with the Fund; it may also sue any other tortfeasor who may exist, provided it can get B's consent and proceed in his name (which is doubtful, since it has no contract with him and is not subrogated to his rights); and it may have to sue C's reinsurers, who will probably successfully argue that their obligation is to C and C alone.

It is well known that the penalties enforced for failure to effect proper insurance under the Road Traffic Acts have been quite inadequate. Should they be applied more effectively in the future, it may well be that the 13,000 convictions which are obtained annually for this offence will rapidly dwindle to insignificance. This in itself would be a real improvement in the third party's lot, but in addition it is proposed that where the defendant motorist is uninsured, the Central Fund shall again come into operation. So also, where the insurer is liable but insolvent, is the protection of the Central Fund to be extended to the injured third party. Indeed, the only case in which no absolute protection is offered

occurs where the motorist responsible for the injury cannot be traced, and here, of course, there is no means by which the existence of liability itself can be proved.

In concluding this brief survey of the successive improvements made and suggested in the position of injured third parties, one may ask, if in lavishing such tenderness upon one section of the community at the expense of another the Legislature have not strained a little the quality, not of mercy, but of justice. Sympathy one undoubtedly feels for those whom money and material comforts cannot restore to life, sanity, and health, but this can hardly be regarded as a reason for putting an added burden upon insurers as a class. It is therefore questionable if justice will be done, or, which is of great importance, if justice will appear to be done, in raising the position of one class of plaintiff relatively to another and in transferring burdens from one section of the community to another in a manner which cannot fail to upset some very settled notions of law. It must not be overlooked that there are many kinds of physical injury other than those inflicted by motorists on pedestrians, and that motorists themselves are not infrequently injured owing to the fault of other kinds of road users. Perhaps greater than all these things, from a legal viewpoint is the commentary which may fairly be made that so well-intentioned a social experiment as compulsory insurance should not be allowed to have as its chief result the benefiting of one set of individuals at the expense of another set. As a social experiment, this matter could be put in quite a different way from another angle.

HECTOR HUGHES.

CHILD-KILLING IN ENGLISH LAW

Part II

3. Proposals for Reform

BEFORE we relate the actual recommendations of the 1866 Commission,[11] it is advisable to note the diversity of opinions expressed by the witnesses before it. It explains the number of different proposals subsequently embodied in draft bills and, partly, the reason why reform was so long delayed.

Baron Bramwell was very representative of the school of thought which doubted the desirability and the practicability of reform. He expressed doubts about the time-limits of the proposed new offence and about the persons who should be covered by it. He objected to the principle of alternative verdicts and thought juries would be as reluctant to convict of an offence punishable with penal servitude for life as they were to convict on a capital charge.[12]

Most witnesses, including Cranworth, Martin, Willes, Avory and Stephen, favoured the creation of a new offence "between murder and concealment," but they differed widely on the exact details of the reform. The majority would limit the exemptive effects of the reform to mothers; a minority would extend it to other persons. Opinion was fairly evenly divided on the question whether it should cover legitimate as well as illegitimate mothers. On the time-limit of the exemption from the law of murder the suggestions ranged, mainly, from a week to three months. Though he was somewhat confused on the general lines of the reform desirable, Stephen enunciated very clearly the dominant consideration which should determine this particular feature of it. In view of the interpretation of the Act of 1922 by the Court of Criminal Appeal, we append an extract from his evidence on this subject.[13]

[11] The First and Second Criminal Law Commissions (1834–48) recommended no reforms relating to our subject save those touching concealment of birth described above, p. 215.

[12] By 1874 he had advanced sufficiently to approve of the reform proposals in the Homicide Law Amendment Bill described below.

[13] "The operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman just after child-birth is so upset, and is in such a hysterical state altogether, that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health. . . . Besides that, there is a strong sympathy, which it is never safe to neglect and which will always exist, with the miserable condition of the woman; and there is a sort of feeling (I do not say it is very reasonable, and I do not know exactly how to connect it with the fact) as a general rule against the father of the child, who goes unpunished, which makes its way with juries and with the public. It seems to me that that being so, and as you have to legislate for human nature as you find it, it would be a very desirable thing to pass a special statute . . . enacting that any woman who killed her new-born child with intent to conceal the birth should be liable to the severest secondary punishment in the discretion of the judge. . . . *I do not know*

A common source of confusion was the idea that the one and the same single proposal could avoid the breakdown in the law relating to infanticides and stop the gap in the law of murder which gave impunity to the slayers of unborn children. Stephen fell in 1866 into the further difficulty of trying to include the element of concealment of birth in the reform and that coloured his views at that date on the question of the time-limit. He subsequently disembarrassed himself of this complexity.[14]

A common proposal of this period, which is of particular interest as it was revived as late as 1909, was that the Judges should have restored to them the power of recording, instead of passing, the death sentence. This power they had possessed in cases of murder until 1861 and it did help them to avoid "the solemn mockery" of passing the capital sentence in cases in which long experience taught that it would never be executed. Rather surreptitiously, apparently, they had been deprived of this power by the Offences against the Person Act, 1861, s. 2. Some of them felt aggrieved; others agreed that this discretion was better vested in the Home Office. A full explanation of the history of this matter merits a separate article, but it is noteworthy here inasmuch as many reformers thought that the restoration of this lost power would in itself be a great corrective of the evils of the then state of the law of murder, and, particularly, of its breakdown in infanticide cases. The suggestion illustrates a perennial tendency to avoid reforms of the substantive law by relying upon a recourse to judicial or executive discretion.

The Commission itself, after remarking upon the difficulties involved in the existing rules relating to proof of live-birth, recommended that an Act should be passed "making it an offence—unlawfully and maliciously to inflict grievous bodily harm or serious injury upon a child during its birth, or within seven days afterwards, in case such a child has subsequently died. No proof that the child was completely born alive should be required."

that I should wish to limit the time very nicely because the effect of child-birth upon a woman's nerves lasts for a considerable time in some cases. I would rather have a little indefiniteness in the law than run the risk of an encounter between the law and public sentiment." In reply to the question, "You would not say that if an infanticide occurred three weeks or a month after the birth of the child, it should be too long a time?" Stephen said, "No, I am inclined to think (but I give the opinion with some degree of misgiving about it), that an attempt to conceal the birth ought to be an element of the special offence—and, of course, an attempt to conceal could not exist, except in the case of what is, in ordinary language, a new-born child; it could not exist when everybody knew that the child was born." B.P.P., 1866, 21, pp. 291–2.

[14] This type of comprehensive single proposal is well illustrated by a section in a draft bill submitted to the Commission by Willes, J., who suggested the creation of a misdemeanour (Avory would make it a felony) of causing an injury to, or the death of, a child at or about the time of birth, for which offence proof of the death of the child before birth was to be no bar to conviction. *Ibid.*, pp. 292, 234–6, 670.

They objected to concealment of birth being an alternative verdict on an indictment of murder. The accused should not be entitled to be acquitted on trial for the new offence, or for concealment, if it should be proved that the offence amounted to murder or manslaughter. They recommended the restoration of the lost judicial power to record the death sentence.[15]

The immediate result of the Report was a series of attempts to translate its recommendations into legislation, the first being the Law of Capital Punishment Amendment Bills of 1866 and 1867 introduced by Walpole and the Law Officers.[16] Other reform movements of this period are briefly summarised below.[17]

In 1872 Russell Gurney sponsored a Homicide Law Amendment Bill dealing with the law of homicide generally. Relative to our subject, it is worthy of note that the Bill proposed to define a "person" for the purposes of the law of homicide so as to include "every child in the act of birth which has breathed" and that, in addition to this modification of the law of homicide, it provided that if a woman murdered her child "at or soon after birth and whilst deprived of her ordinary powers of self-control by the physical effects of the birth," the trial Judge in his discretion could sentence her to penal servitude for any term of not less than five years.[18] This Bill was re-introduced in much the same form in 1874 under the names of Gurney and Lopes, but its definition of the term "person" reverted to the existing rules of the common law. A change in the infanticide section marks the beginning of a series of attempts, culminating in the Act of 1922, to have this offence dealt with like manslaughter. Section 29 reads as follows: "Criminal homicide is manslaughter and not murder . . . (3) If the person whose death is caused is the child of

[15] *Ibid.*, p. 1.

[16] B.P.P., 1866, 3, 311 (No. 245); 1867, 4, 467 (No. 25).

[17] The Murder Law Amendment Bill, 1871, sought to divide murders into two classes and contained provisions specifically dealing with offences against infants, the main proposal being to create two offences, punishable with varying terms of penal servitude, the major one being the murder by a mother of her child not exceeding seven days old, and the minor one, the injuring by a mother of her child at birth or within seven days thereafter. It also provided for the restoration of the lost power to record. B.P.P., 1871, 4, 313 (No. 141).

The report of the Select Committee on the Protection of Infant Life, 1871 (*supra*, p. 223) was followed by the introduction of bills in 1871, 1872 and 1873, proposing to meet the evils of baby-farming by the establishment of a system of licensing. Whilst not strictly relevant to our subject, these and other similar movements are worthy of note as the precursors of enactments dealing with conditions which only too frequently encouraged the crime of child-killing. B.P.P., 1871, 2, 483 (No. 49); 1872, 2 (Nos. 6, 108, 146); 1873, 1 (No. 89). See also the Infant Life Protection Act, 1872.

In 1867, 1868, 1869, 1872 and 1873 bills were introduced by official and private members relating to capital punishment, but they did not refer specifically to the subject of child-killing. B.P.P., 1867, 1 (No. 24); 1868, 1 (No. 36); 1868–69, 1 (No. 71); 1872, 1 (No. 32); 1873, 1 (No. 46).

[18] B.P.P., 1872, 2, 241 (No. 289).

the person who causes it, and if the act by which death is caused is done whilst such last-mentioned person, though not within the provisions of s. 24 [which dealt with the exemptive effects of insanity] is deprived of the power of self-control by any disease or state of mind *or body* produced by bearing the child whose death is caused." The usual provision for the restoration of the lost judicial power also appeared in the Bill.[19]

Concurrently with these efforts of Gurney, another group of members was attempting to pass an Infanticide Law Amendment Bill. It was introduced in 1873 and 1874 and in its amended form proposed that concealment of birth should be abolished as an alternative on an indictment of murder and that a new felony should be created to meet the case of a mother maliciously wounding or inflicting grievous bodily harm upon her child during or immediately after its birth.[20]

Both the Gurney Bill and this Infanticide Bill were referred in 1874 to a Select Committee of which Gurney himself was a member, a strange selection if we forget the fact that the true author of the Homicide Bill was his old friend and relation, Fitzjames Stephen. It is curious that the Report of this Committee should have met a fate so dusty, for it is one of the best sources of information on the state of the law of homicide in the latter half of the last century. It is more than a treasure-house of facts; it illustrates most vividly the clash of views and mentalities of the three great witnesses who appeared before the Committee, Stephen, Bramwell and Blackburn. "Amazing" is the only proper epithet to apply to the vigour and tone of Stephen's reply to the criticisms of the Bill made by the other two. Seldom in the history of English Law can a member of the Bar have dared to shake occupants of the Bench so thoroughly as he did on this occasion. He was not satisfied with trouncing them separately; with a devastating show of logic, he truculently and sarcastically used the one to knock the other down.[21]

[19] B.P.P., 1874, 2, 365 (No. 44).

[20] *Ex majore cautela*, a Select Committee inserted a clause to preclude the application of the section to a case of killing premeditated by a mother before she became affected by the pains of labour; the offence was to be an alternative on a charge of murder; the Bill contained the usual type of clause designed to avoid the difficulties of proof of live-birth and providing for conviction of this offence despite proof of murder or manslaughter. B.P.P., 1873, 2, 163, 167 (Nos. 43, 241); 1874, 2, 407, 411 (Nos. 25, 200).

[21] The nature of his performance on this occasion might have been partly due to his feelings of despondency at the lethargy displayed in England towards the task of law reform. In a letter of 1872 he said that "England was the centre of indifference between the two poles, India and America. At each pole you get a system vigorously administered and carried to logical results. In the centre you get the queerest hubblebubble, half energy and half impotence, and all scepticism in a great variety of forms." Leslie Stephen, *op. cit.*, p. 304.

The Committee recommended that the Bill should be dropped "notwithstanding that this experiment in codification has been presented to them with every advantage that learning and skill can give it." The objection which carried weight with the Committee was not the alleged deficiencies of the Bill but the inconvenience of a partial measure, a point strongly stressed in the memorandum submitted by Cockburn. "The particular question of homicide involves principles applying to other parts of the criminal law; and a partial treatment would only serve to introduce confusion and doubt." The Report earnestly recommended that the attention of Parliament should be directed to the imperfect state of the definition of the law of murder, "to rescue the law from its present discreditable state." "If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical."[22]

We have already described the infanticide provisions in Stephen's Bill (s. 29 (3)). What he sought to do was to put the effects of child-bearing on the same footing as other violent excitements like anger or fear; women were entitled to that indulgence to human weaknesses generally shown by the law relating to provocation—a part of the law, incidentally, which he wished to base on a more systematic foundation and which he was prepared to extend very substantially. Stephen also favoured the restoration of the judicial recording power. Bramwell strongly dissented on this latter question, but approved of the infanticide provision in the Bill. Blackburn also disapproved of the recording power and only gave a qualified approval to s. 29 (3). He was much impressed by the failure of the law to meet the case of killing a child before it had become a "person" and the lack of provision to make a mother guilty of manslaughter in respect of pre-natal negligence. He would make it a felony for the parent of a child either before, at, during, or immediately after birth wilfully to cause the child to die or to prevent it being born alive and would also create a new offence to meet the case of pre-natal neglect. Whilst Stephen's proposals would meet the failure of the law to deal with infanticide by mothers, they did not provide for "child destruction"; Blackburn's suggestions met the latter offence, but not the former.

Between 1874 and 1877, we hear little in Parliament of the efforts of Stephen and his collaborators to amend the law. The reason for this was that he had accepted the grounds expressed for the rejection of his Homicide Bill not as a reason for abandoning

[22] B.P.P., 1874, 9, 474 (No. 315).

the attempt but for extending the scope of his work of codification.[23] But during this period some other reformers were active in Parliament.[24]

In 1877, the famous Draft of a Criminal Code for Jamaica was presented to Parliament with an Explanatory Memorandum by Mr. R. S. Wright, as he then was. It is relevant to refer very briefly to its provisions on our topic as it had been revised by Stephen and was drafted in the same period as the English Draft Code, which we are about to discuss. It stated the duty of a mother to take all necessary and reasonable care of her child until it could be safely weaned (s. 105), an important provision in the light of the offence of manslaughter by negligence made punishable in the Code by penal servitude for a term of five years (s. 113). Intentional and unlawful harm to a child during the time of its birth was punishable with penal servitude for ten years (s. 116). S. 130 declared that, for the purposes of s. 116 (i), where harm was caused to a child during the time of its birth and where upon discovery of the concealed body of a child harm was found to have been caused to it, such harm was to be presumed to have been caused before death—a reversion to something like the old presumption of live-birth which we described earlier, and (ii) the expression "during the time of birth" was to include the whole period from the commencement of labour till the time when the child "so becomes a person as that it could be murder or manslaughter to cause its death." That happened when it was completely brought forth alive from the body of the mother; proof of an independent circulation, separate respiration, or of severance of the cord was not necessary (s. 128). Concealment of the body, whether the child was born alive or not, with intent to conceal its birth, existence or death, or manner or cause of its death, was punishable with imprisonment for ten years (s. 117).

[23] Leslie Stephen pays eloquent tribute to his patience and perseverance in face of disappointments and explains his labours during the years 1874–77 which led to his great work on the Criminal Code, *op. cit.*, 353, 357, 375–81.

[24] One promoter of the Infanticide Bills of 1873–4 reintroduced a similar measure in 1875 (B.P.P., 1875, 3, 55, (No. 43)). In 1876 yet another Homicide Law Amendment Bill was introduced by Sir Eardley Wilmot, proposing to divide murders into capital and non-capital degrees. Infanticide by a mother within seven days of the birth was to be in the second category. The verdict of concealment as an alternative to murder was to be abolished and the lost power to record was to be restored (B.P.P., 1876, 3, 191 (No. 75)). Wilmot introduced a shorter Bill of the same nature in 1877, giving juries the power to add "with premeditation" to their verdicts of murder so as to make the offence capitally punishable; infanticide was to be punishable by a minimum term of penal servitude for five years (B.P.P., 1877, 2, 463 (No. 104)). In a similar Bill of 1878 infanticide within fourteen days of the birth was to be punishable like manslaughter (B.P.P., 1878, 3, 465 (No. 108)). The Capital Punishments Bills of 1877, 1878, and 1881, did not refer specifically to child-killing but were relevant inasmuch as they proposed that the punishment for all murders should be a life sentence (B.P.P., 1877, 1, 251 (No. 96); 1878, 1, 263 (No. 19); 1881, 1, 417 (No. 27)).

Any secret disposition was to be sufficient, whether intended to be permanent or not; abandonment in a public place would suffice if done to conceal; the child concealed must not be of less than six months' growth; the concealment must be intended to be general and not from particular individuals only; the offence could be committed by any person and not merely by a parent (s. 131). Finally, a woman who caused the death of her child recently born when she was deprived of the power of self-control by a disorder of mind produced by child-bearing was to be found guilty of manslaughter and not murder (s. 121).[25]

This Jamaican Code did attempt to deal with the twin problems of infanticide and child destruction and did clarify some points on concealment which were and are doubtful in English Law. Its proposals must have influenced Stephen whose Code was introduced into Parliament by Holker, the Attorney-General, in 1878. To facilitate understanding of the various changes in the forms of the Code between 1877 and 1880, we have appended a brief note on its history.[26]

The provisions of the Criminal Code (Indictable Offences) Bill, 1878, which concern our subject are the following. S. 138 dealt with infanticide and accorded the mitigating effects of provocation to the effects of child-birth.[27] S. 146 sought to avoid the difficulties which had arisen over the words "by any secret disposition" in the definition of concealment in the Offences against the Person Act, 1861, s. 60, by substituting for them the words "disposes of its dead body *in any manner* with intent to conceal the fact that the mother was delivered of it."[28] Child

[25] B.P.P., 1877, 61 (No. 1893).

[26] Stephen's first form was slightly amended by the Law Officers and introduced into Parliament in 1878. The Commons could not then spare the time to discuss it but appointed a Commission consisting of Lord Blackburn, Barry, J., Lush, L.J., and Stephen to consider it. They sat daily for over five months and discussed "every line and nearly every word of every section," examined all the authorities and tested elaborately the completeness of the Code. The Bill was amended in the light of these discussions, but the Report, signed in June, 1879, was too late for action to be taken in the 1879 session. When introduced in 1880, a change of ministry put an end to its prospects. In 1882, the procedure part was announced as a Government measure in the Queen's speech, but it "vanished in the general vortex which swallows up such things, and with it vanished any hopes which Fitzjames might still entertain of actually codifying a part of English Law." Leslie Stephen, *op. cit.*, pp. 375–81.

[27] S. 131 defined a person for the purposes of homicide according to the existing rules of the common law. In the 1879 amendment, this was tightened up by providing that proof of an independent circulation was not necessary. S. 138 provided that a mother who killed her child at or immediately after its birth was to be punished as for manslaughter if she was at the time "deprived by reason of *bodily or mental* suffering of the power of self-control."

[28] The difficulty Stephen sought to avoid still remains; he followed in part only the provisions of the Jamaican Code. The Stephen Code also attempted to avoid the doubt about the age of the child whose body is concealed which still exists to this day.

destruction was dealt with in s. 168 of the Bill, the section which related to abortion. It read as follows: "Everyone shall be guilty of an indictable offence . . . who does any of the following things: (*a*) Everyone shall be liable to penal servitude for life . . . (iii) Who causes the death of any living child which has not proceeded in a living state from the body of its mother by *any act or omission which would have amounted to murder* if such child had been fully born." A proviso was attached to protect *bona fide* acts done to preserve the life of the mother. This section is of considerable interest as it can be described as the parent of the definition of the felony of child destruction in the Act of 1929, though there are some differences between the two.[29] Maternal pre-natal neglect resulting in the death of a live-born child could not have been covered by any provision of the Draft Code in its original form, nor does it come within the terms of any subsequent enactment.[30]

The history of these proposals during the months of consideration given to the Draft Code can be shortly summarised. The infanticide proposal (s. 138) disappeared completely and was replaced by two novel provisions (ss. 185, 186). The first declared that every woman should be guilty of an indictable offence, punishable with penal servitude for life, who, being with child and being about to be delivered, with the intent that the child should not live, neglected to provide reasonable assistance in the delivery, if the child died immediately before, during, or shortly after birth, unless she proved that such death was not caused either by such neglect or by any wrongful act to which she was a party. The second related to a similar, but minor, offence, punishable with seven years' penal servitude, in which the omission to obtain assistance was connected with an "intent to conceal the fact of her having a child" and which resulted either in the death of, or permanent injury to, the child.[31] The only change made in the concealment provisions was that the proviso relating to the age of the foetus in the 1878 Bill was deleted.[32] By 1879 the offence of child-destruction, previously included in the section relating to abortion, had achieved the importance of being defined in a separate section (s. 212).[33]

The Report of the Commission on the Draft Code was signed

[29] The Act of 1929 does not mention omissions but only "any wilful act . . . with intent to destroy the life of a child capable of being born alive."

[30] B.P.P., 1878, 2, 5 (No. 178).

[31] These sections suggest the hand of Blackburn. They met the problem of pre-natal neglect but in each case rested on proof of specific intents.

[32] *Supra*, n. 28.

[33] A point of incidental interest is that the Bill of 1879 (s. 531) proposed to abolish the jury *de ventre inspiciendo* and to substitute a medical examination. The Bill of 1879 (B.P.P., 1878–9, 2, 175, (No. 117)), as amended in Committee, was ordered to be printed in May, 1879 (*ibid.*, p. 427 (No. 170)).

in June, 1879. It explains why the provisions relating to infanticide in the original Bill had been omitted in favour of ss. 185 and 186.[34] Apart from this, the Report contains little of note relevant to our subject. When the Bill was re-introduced by the Law Officers in 1880, it contained no change of importance except that the two "neglect in childbirth" sections had been amalgamated into one comprehensive section (s. 181).[35]

It may be of interest to mention the little-known fact that in 1880 another Criminal Code Bill was introduced by a group of private members. It contained several proposals relative to our subject.[36] The interest displayed in the topic of child-killing in this period is also shown by some documents contained amongst the Parliamentary Papers.[37] But the depressing experiences of the promoters of the Draft Codes appear to have discouraged further efforts for some considerable time.[38] There was little or no movement for reform of the law of homicide during the last two decades of the century.[39]

The next attempt came in 1908, when Mr. George Greenwood, who had called in 1907 for a return of the various punishments

[34] B.P.P., 1878–9, 20, 169 (No. 2345). The Commissioners considered that most women found guilty of concealment of birth under the existing law were really guilty of the offences created by these two sections and that these new provisions would often afford a means of punishing child-murder where there would be a practical difficulty in obtaining a conviction of murder because of the necessity of proof of live-birth.

[35] B.P.P., 1880, 2, 1 (No. 2).

[36] B.P.P., 1880, 2, 223 (No. 47). It was "prepared and brought in by Mr. Wheelhouse, Serjeant Spink and Captain Pim" and consisted of 763 sections as contrasted with the 500 of the Stephen Code. It proposed that a woman who intentionally did an unlawful act from which the death of her child resulted, either in the act of birth or immediately thereafter, being at the time deprived of her self-control *by reason of physical or mental suffering or distress*, should be punished as for manslaughter, and that proof of live-birth was not to be necessary for conviction, the proof of dead-birth being placed on the woman. Bodily harm inflicted on the child within fourteen days of birth by its mother in such circumstances was to be punishable, if it resulted in death, by a maximum term of twenty years' penal servitude. Apart from its ambiguous drafting, the Bill had the demerit of not containing any comprehensive proposal relating to child-destruction by persons other than mothers; nor did it contain any definition of a "person" for the purposes of homicide.

[37] Returns were given in 1881 of the number of death sentences for infanticide between 1876 and 1880 and of the manner of exercising the prerogative of pardon since 1860 (B.P.P., 1881, 76, 363, 369, 391 (Nos. 179, 436, 437)). In the same year we find *Reports on Laws of Foreign Countries respecting Homicidal Crimes*, from which a great deal of comparative material can be gleaned (*Ibid.*, 197 and 367 (Nos. 2849, 2913)).

[38] The Capital Punishment Abolition Bill, 1882, backed by Mr. Justin McCarthy, did not refer to our subject directly (B.P.P., 1882, 1, 425 (No. 55)).

[39] It is noteworthy that fresh efforts were made to cope with baby-farming, cruelty to children and similar matters on the periphery of our subject during this period. The magnitude of the problem was indicated by the papers relating to the Infant Life Protection Bill, 1896, which showed that in London alone the bodies of 227 infants were found in the streets in 1895 (B.P.P., 1896, 10, 225 (No. 343)). The references to papers relating to these topics are too numerous to mention here.

for homicidal crime provided by the penal codes of Europe and the United States,[40] introduced a Law of Murder Amendment Bill "to carry out the recommendations of the Royal Commission on Capital Punishment, 1866."[41]

At the Committee Stage of the Children Bill, 1908, the Lord Chancellor, Lord Loreburn, moved to insert a clause to the effect that "where a woman is convicted of the murder of her infant and that child was *under the age of one year*, the Court may, in lieu of passing a sentence of death, sentence her to penal servitude for life or any less sentence." He supported his motion by referring to the "solemn mockery" of passing the death sentence in such cases. Lord Alverstone, C.J., opposed the clause mainly because he thought the discretion better vested in the Home Office than in the Judges and he renewed his opposition at the Report Stage when Lord Loreburn again moved the insertion of the clause. After further debate, the Bishop of Southwark very effectively appealed to the Lord Chief Justice to feel in his conscience that a responsibility rested upon him to take some other action if he did not approve of Lord Loreburn's motion.[42]

Lord Alverstone responded to this plea by himself introducing in May, 1909, a Child Murder (Recording of Sentence of Death) Bill. In his opinion, the only way of countering the breakdown of the law was to restore to the Judges the power of recording the death sentence instead of passing it in cases of infanticide. Lord Loreburn damned the Bill with faint praise, Lord James of Hereford with sarcasm. They both stated they they could not understand why the Judges should be so reluctant to exercise discretion in these cases.[43] The Bill was given a second reading, and in Committee Lord James moved an amendment to provide that, if a mother who had not recovered from the effects of child-birth killed her infant, the Judge could direct the jury that they might acquit of murder and convict of manslaughter. Lord Alverstone finally surrendered and accepted this amendment. At this stage Lord Ashbourne moved an amendment which it is of interest to record in the light of the provisions of the recent Infanticide Bill,

[40] B.P.P., 1907, 68, 99 (No. 316).

[41] B.P.P., 1908, 3, 71 (No. 316); 1909, 3, 423 (No. 58). It proposed to divide murder into two classes and specifically provided that no woman was to be indicted for murder for killing her child at birth or within one month thereafter, but a woman who maliciously inflicted serious injury upon her child during that period resulting in death was to be guilty of an indictable offence punishable with penal servitude, imprisonment, or detention during H.M.'s pleasure.

[42] The motion was defeated by six votes: Lords Halsbury, Alvertsone, Lawrence and Macnaghten opposed, Lords Loreburn and Coleridge supported the motion (Parl. Debs., 195, 1178 *et seq.*; 196, 458, *et seq.*).

[43] Exercising the power to record, in fact, meant an exercise of judicial discretion, because when the Judges before 1861 did record, in practice it always meant a reprieve.

1936. In addition to the disturbances of childbirth, he would grant to the mother the mitigating effects of provocation to such circumstances as the desertion of the father, expulsion from her family, unemployment, sickness and destitution. In such cases the Judges could direct a verdict of manslaughter if they considered that course proper "having regard to all the circumstances of the case." Lord Alverstone demurred to vesting such a wide discretion in the Judges, but Lords Loreburn and James agreed with the substance of the amendment, the latter remarking that, in fact, the Judges did exercise such discretion as they advised the Home Office on all questions of reprieve. The amendment was withdrawn for reconsideration before the Report Stage, but that was the last heard of it in 1909. The Bill itself was given a Third Reading by the Lords and reached the Commons in July, 1909, under the title of "Child Murder (Trial) Bill." It consisted of one clause drafted in the sense of Lord James's proposal.[44]

It probably met the same fate as the Infant Life Protection Bill introduced into the House of Commons in April, 1909, by Lord Robert Cecil, who proposed to make the destruction of infant life during birth an offence punishable with penal servitude for life, with an exception in favour of a doctor who *bona fide* tried to save the life of a mother by destroying the child. Lord Darling stated in 1928 that this Bill lapsed after coming through a Standing Committee because Mr. Asquith refused to allot the necessary Parliamentary time to it.[45]

The next move came when Mr. Arthur Henderson presented the Child Murder (Trial) Bill in February, 1922. It passed through the House of Commons with little or no debate on it. Lord Parmoor introduced it in the Lords and was supported by Lord Phillimore who had been consulted on the subject in 1908 and 1909. The Lord Chancellor, Lord Birkenhead, recommended that it should be given a Second Reading and at the Committee Stage moved certain amendments suggested by the Law Officers and the Director of Public Prosecutions. When the Bill returned in its amended form to the Commons, its original sponsors agreed with the changes and it became the Infanticide Act, 1922, with only Sir Frederick Banbury, the notorious critic of all new measures, in lone opposition to it.[46]

[44] Parl. Debs. (H.L.), 1909, 1, 638, 721–8, 957–965; *ibid.* 2, 68, 144, 158.

[45] B.P.P., 1909, 3, 241 (No. 242).

[46] Lord Birkenhead could not resist as usual the temptation to "bait" Lord Parmoor, whom he described as having little experience of criminal law, to which the latter retorted that he had been chairman of Quarter Sessons for thirty years (Parl. Debs. (H.L.), 1922, Vol. 50, 81, 436, 756, 1096, 1164; *ibid.*, Vol. 51, 641; *ibid.*, (H.C.), Vol. 150, 615, Vol. 151, 2151–2; Vol. 152, 1149, 2392; Vol. 155, 2485; Vol. 156, 2313).

Finally, Lord Darling introduced in 1928 what originally bore the title of "Infanticide Bill" to meet the gap in the law which prevented the punishment of those who killed infants before they had become "persons" within the definition of homicide. Lord Hailsham urged the adoption of the Bill provided it was amended so as to "avoid ringing the changes between various Acts" by the introduction of a provision for alternative verdicts. It was he, also, who suggested the addition of the proviso to protect *bona fide* acts done to save the life of the mother. After its emergence from a Select Committee[47] it passed the two Houses with little opposition and became the Infant Life (Preservation) Act, 1929.[48]

Part IV

4. The Reforms and After

As no important question has yet arisen on the interpretation of the Act of 1929, it can be conveniently dismissed by a brief reference to its provisions before we proceed to discuss the Infanticide Act, 1922.[49] Child destruction can be committed by *any* person. As it demands a wilful act done with intent to destroy the life of the child, it does not close the gap in the law of manslaughter to which we drew attention earlier.[50] The child must die "before it has an existence independent of its mother," otherwise the offence will fall within the scope of homicide. We have already discussed the uncertainties which surround the question of independent existence. The two-way system of alternative verdicts for which provision is made in the Act illustrates how thoroughly the modern policy of the law has rejected the objections to such a system which were constantly voiced in the first three-quarters of the last century.

[47] It consisted of Lords Desart, Phillimore, Dawson of Penn, Hewart, Darling, Merrivale and Hanworth.

[48] Parl. Debs. (H.L.) 1928, Vol. 71, 616–21; 742, 846, 870 998, 1057; *ibid.* (H.C.) 1928–9, Vol. 223, 2820; Vol. 224, 609; Vol. 226, 2224; Vol. 227, 1065, 1884, 2333, 2447.

[49] S. 1 reads ". . . any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life." A proviso adds that no person is to be found guilty unless it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother. It also provides that evidence that a woman at any material time has been pregnant for 28 weeks or more shall be prima facie proof that she was pregnant of a child capable of being born alive.

[50] For the cursory way in which English criminal law has dealt with negligent acts generally, see R. S. Wright's Memorandum on the Jamaican Code (B.P.P., 1871, 61, at p. 10).

The felony of Infanticide[1] is a substantive offence which is not dependent upon an indictment of murder but which provides an alternative verdict on such an indictment.[2] The Act speaks of "an act or omission." The liability of accessories is not specifically dealt with in the Act. In the last century strong opinions were expressed that they should be subject to the ordinary law of murder.

The appellant in *R.* v. *O'Donoghue* (1927), 20 Cr. App. R. 132, had been convicted of the murder of her thirty-five days old infant and sentenced to death by Talbot, J. This "solemn mockery" had been duly followed by a reprieve before the appeal was heard. It was admitted that the appellant was "in great distress at the time of the birth for some weeks from poverty and malnutrition, and had only just obtained employment when she killed the child." The learned Judge had ruled that there was evidence of insanity to go to the jury, but none of infanticide. He directed that the infant could not be said to be "newly-born" within the meaning of the Act. In the Court of Criminal Appeal the appellant's counsel strongly contested this ruling. His argument was that "between insanity and sanity there is a degree of mental derangement which the medical authorities call 'puerperal' which might appear physically for any period from two to six weeks after child-birth" and that it was to meet this condition that the statute was designed. He urged that the Judge's ruling went to defeat this intention.[3] Without calling upon Sir Travers Humphreys, as he then was, to reply for the Crown, and without reserving its judgment for consideration, the Court dismissed the appeal. Lord Hewart, C.J., said that the argument for the defence was "that the real question is, not how many days ago or how many weeks ago the child was born, but whether the child which is killed is the child from the effects of whose birth the mother

[1] S. 1 (i) reads "Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of a felony, to wit of infanticide and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child."

[2] The Act provides that the old system of alternative verdicts on an indictment for murder is not to be disturbed. On an indictment for infanticide a verdict of concealment or of "cruelty" (now s. 1 of the Children and Young Persons Act, 1933) may be returned.

[3] Avory, J., denied the accuracy of a statement in *Jervis on Coroners* that he had held a three weeks old child within the definition. Counsel quoted a ruling by Shearman, J., at Reading Assizes that a six weeks old infant was "newly-born." An interesting passage in the argument refers to the questions which should be left to the jury; counsel thought the mother's state of mind should be so left, but was more doubtful on the "newly-born" issue.

accused has not yet recovered at the time of the committing of the Act." He added, "In our opinion to read the section in that way is to misread it; it is to eliminate from the section the epithet 'newly-born.' . . . In order that the conditions of this section may be fulfilled, there must be at least three co-existing circumstances: first, the child must be the child of that mother; secondly, the child must be her newly-born child; and thirdly, at the time of the act or omission she must not have fully recovered from the effect of giving birth to that child, and by reason thereof, the balance of her mind must then have been disturbed. But it is crucial in the matter that while conditions 1 and 3 are fulfilled, condition 2 is also fulfilled and the child is a newly-born child. . . . We do not propose to undertake the task of defining this expression 'newly-born child.' It is enough for the purposes of the present appeal to say that Mr. Justice Talbot made no error in law in holding, with reference to a child of more than a calendar month of age, that there was no evidence upon which he could invite or permit a jury to find that the child was newly-born within the meaning of the Statute."

Before considering the terms of this judgment, it may be well to note the effect it had in *R.* v. *Hale*, a case tried at the Old Bailey in 1936.[4] The victim was three weeks old when it was killed by its mother who had also inflicted throat injuries at the same time on herself. This was her second child; three weeks after the birth of her first child she had developed symptoms bordering on puerperal insanity. After the second birth she again developed similar symptoms; in fact, a medical witness at the trial was prepared to say that she was insane at the time of the killing and did not know what she was doing. Lord Dawson of Penn gave evidence for the defence that she was suffering from puerperal insanity. Questioned as to the length of time it takes a mother to recover from the conditions of birth, he replied, "I should say not less than three weeks, in many cases longer." When questioned on the meaning of the term "newly-born," he said that it had never been defined and added, "When we study the mortality of the early period after birth, we are accustomed to fix a month. I believe the Ministry of Health in their statistics have also adopted a month." Humphreys, J., told the jury that he was bound by the decision in *R.* v. *O'Donoghue*[5] and added an expression of hope that Parliament would soon amend the law by defining a "newly-born child" as one under a month old. He

[4] *The Times*, 22nd July, 1936, p. 13.

[5] The report does not indicate why his Lordship considered himself bound by a decision relating to a child *over a month old*.

suggested that this would meet with the approval of Lord Dawson and that "four weeks is a reasonable time having regard to the number of illnesses from which children suffer and sometimes die."[6] He then invited the jury to find Mrs. Hale "guilty but insane," a verdict which would relieve him "of the necessity of having to sentence a person who you may think ought not to be sentenced at all for any offence." The jury dutifully followed this direction and Mrs. Hale was ordered to be detained during His Majesty's pleasure.

The position, consequently, is that the Courts are placing a time-limit on infanticide which they refuse to define, but which seems now to be at least under three-weeks after the birth. It is humbly submitted that the judgment of the Court of Criminal Appeal not only failed to consider the mischiefs which the Act sought to avoid but also that it was unnecessarily narrow even in the light of the accepted canons of statutory interpretation. Lord Hewart was perfectly right in stressing the three conditions which must be satisfied before the statute can operate, but it does not follow that these three conditions must be interpreted completely independently of each other. His Lordship said that counsel would interpret the Act as if the second condition, that imported by the words "newly-born," were otiose. With respect, it may be urged that his Lordship interpreted the second condition as if the vital third condition, the derangement of the mother's mind consequent upon the birth, were not mentioned in the Act. The words "newly-born" should not have been elevated to the status of being decisive of the whole scope of the reform. If the reformers of 1922 had desired to place a narrow time-limit on these cases, nothing in the world would have been easier than for them to have inserted in the Act a clause to that effect. After tracing the whole history of this reform, we cannot believe that the omission to do so was inadvertent. The question had been most thoroughly discussed in the past and it is difficult to believe that the draftsmen of the 1922 Act were totally ignorant of these discussions. We suspect that they deliberately left the time-limit undefined because they never intended that the age of the child should be the determining factor in deciding whether a case comes within the scope of the Act; the vitally important matter was the mother's mental derangement *post* and *propter* the birth. The very fact that the mental disturbance must be consequent upon the birth of the victim in itself, in the vast majority of cases, places a time-limit on the operation of the Act, but it is not one limited to the three weeks or a month of the Court of Criminal

[6] The relevance of these illnesses to this subject is not quite clear.

Appeal and Mr. Justice Humphreys. Let us recall the words of Stephen: "I do not know that I should wish to limit the time very nicely because the effect of childbirth upon a woman's nerves lasts for a considerable time in some cases. I would rather have a little indefiniteness in the law than run the risk of an encounter between the law and public sentiment." It is true that he added, "I would let the Judges reduce that to such a degree of definiteness as circumstances might show to be necessary," but, we submit, the circumstances which he had in mind were not those relating to the age of the child but those which normally surround puerperal insanity. As the case of Mrs. Hale showed, it may well be three weeks before the symptoms of that derangement become apparent. We cannot conceive what the circumstances could have been which so compelled the Court of Criminal Appeal to give an unreserved judgment to fix a narrow time-limit on the Act. Had the Court decided the case on the ground that the particular mother involved in it had not been proved to have been suffering from derangement attributable to the physical effects of the birth, the report of the case suggests that the decision might have been justifiable. But that was not done. The Court said what the Act does not mean and shirked the task of saying what it does mean and thereby added to the number of the illustrations of the judicial process at its worst. The decision is, in effect, an invitation to a recurrence of the mischiefs which reformers for sixty years before the Act had attempted to correct; to another divorce between law and public opinion, to another failure by juries to operate the law properly, to another recourse to the discreditable using of alternative verdicts which fail to state the true offences committed, to a refusal by Judges to discharge the duty of exercising a discretion which has been placed upon them by the considered efforts of their own predecessors.

If we survey the history of the reform, the appropriate title for the Act was not the "Infanticide Act" or the "Mentally Disturbed Mothers (Protection) Act," but the "Judges (Protection against the Solemn Mockery) Act." We need not go back to 1866, or 1872–4, or 1878–80 to prove this; a reference to the debates in the House of Lords in 1908, 1909 and 1922 is sufficient. The really decisive factor in the achievement of the reform was not so much the public sympathy for mothers, though that was not a factor ignored by such eminent lawyers as Stephen, Loreburn, Alverstone, James of Hereford, Phillimore and others, but the judicial sentiment against the "solemn mockery" favoured by a system which compelled the Judges to pass the death sentence on persons in a class of case in which it had not been executed since

1849. The main argument advanced time and again by the Judges who played so prominent a part in obtaining its enactment was that it would reduce the opportunities for the staging of the "solemn mockery," so distasteful to the Judges themselves and so disgracefully tending to bring into disregard the most solemn and awful function which a Judge can be called upon to discharge. The Court of Appeal in 1927 limited as narrowly as it could, without making the Act totally meaningless, the possibilities for the exclusion of the "solemn mockery." The decade which saw published an attack on the "new despotism" of executive discretion also witnessed in *R.* v. *O'Donoghue* a judicial surrender of part of a newly-created extension of judicial discretion back again to the Home Office and its executive discretion. The "solemn mockery" in the case of Mrs. O'Donoghue was as solemn and as much of a mockery as ever. Mrs. Hale escaped it by a recourse to the "Guilty but insane" verdict, a verdict which cannot always be appropriate in cases of puerperal insanity, and which may also be used for substituting executive for judicial discretion.

Why this refusal to shoulder a limited discretion by the Judges? The Act of 1922 does not ask them to exempt from all punishment all mothers who kill their children whilst suffering from the after-effects of child-birth; it only asks them to exercise a discretion in a very limited number of cases to exempt mothers from *capital* sentence. The Home Office habitually for almost a century has reprieved a much wider class of mothers than can possibly be covered by the Act. Neither their own, nor the public, interest seems to warrant a narrow view being taken of the Act by the Judges.

To accept Mr. Justice Humphreys's suggestion of reform, in our view, would be a retrograde step, a mere ratification of the decision in *R.* v. *O'Donoghue*. Two comments may be made on his Lordship's remark that his view would probably command the support of Lord Dawson because of his evidence in *R.* v. *Hale*. The first is that the statistical practices of the medical profession and of the Ministry of Health are quite irrelevant to the subject of the reform of this part of the law. Secondly, we refuse to believe that Lord Dawson would support the suggestion. He was not sufficiently examined as to his views on the matter to justify the use that was made of his reply to an incidental question. The really relevant remark which he made, and to which no attention was drawn by his Lordship, was that it takes a mother three weeks to recover from child-birth and "*in many cases longer.*" If, as in this case, it took three weeks for the symptoms of the disease to appear after the birth of the first child, we cannot

believe that Lord Dawson would approve a "reform" which puts a mother outside the scope of the Act almost before she can be proved to have been within it! The antecedent judicial precedent is often a very inadequate source of information on the circumstances which conditioned the statement of a rule of law contained in it, but it is infinitely preferable as a starting-point for a new interpretation or for the reform of the law to an irrelevant medical or statistical "precedent."

The least possible measure of reform which can be worthy of the reform efforts of 1866 to 1936, or in accord with current informed public opinion, must be one which recognises once more the principle that the derangement of the mother consequent upon the child-birth is to be the dominant consideration and not the age of the child. This could be done either by removing the words "newly-born" entirely from the 1922 Act or else by putting into that Act a defined time-limit, such as the one year of Lord Loreburn's proposal in 1908, which will be sufficiently wide to cover the great majority of cases of puerperal insanity. The retention of the mental-derangement condition in the reform measure would be a sufficient bar against any abuse of it. The "guilty but insane" verdict would still be possible in cases where the mothers are definitely insane and their detention in a criminal lunatic asylum is desirable in their own and in the public interest. Whatever the theory of lawyers may be about that verdict, it does carry a stigma which makes its use in other cases unjust and undesirable. The mitigated sentence, or the release conditional on supervision, and/or institutional treatment could be used in proper cases.

That these suggestions only give a very moderate expression to the demands of reformers is evident from the terms of the Infanticide Bill, 1936, which proposed to extend the law in two directions. It would allow the killing of infants up to the age of eight years to be exempted from capital sentences and would accept the reform mooted by Lord Ashbourne in 1909 of acceding the mitigating operation of provocation to a mother's mental stress consequent upon "distress and despair arising from solicitude for her child or extreme poverty or other causes." The promoters of this Bill probably proceeded on the principle that "to him who asks much shall something be given," though they were not asking for much more than that the discretion commonly exercised by the Home Office should be transferred to the Judges, so that mercy could be shown *in* the sentence and not *after* it. The disturbance surrounding the Abdication killed this infant Bill when it was "newly-born."

The need for reform is clear. Can it not come through the Law Revision Committee, to which no part of the criminal law, that living repository of antiquated rules, has yet been referred? The whole law relating to offences against the person needs revision, from the felony of murder downwards. We have referred to some sections of the law of murder, manslaughter, concealment of birth and infanticide which are unsatisfactory, and many other matters could be added to the list. The task of reform cannot be satisfactorily discharged in a piecemeal way. As the present confused state of the law relating to motoring offences shows, the satisfactory definition of one offence frequently depends on the definition of some other offence in the same category.

The amount of material which reformers of the criminal law could use is very considerable. In this article we have produced a summary of the relevant Parliamentary Papers relating to a comparatively narrow subject not only to give the background of our subject but also to indicate what a store-house of information those papers are on projects of reform. Much of the historical material may now be antiquated; much of it is not. The architects of the future structure of the law will obviously pay great attention to the merits and demerits of our present edifice and to present and future needs; they can also learn from the multitude of unused plans projected by eminent architects of the past, particularly as their rejection frequently resulted not from any real consideration of their worth but from irrelevant and extraneous circumstances.

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Note—The view advanced in the text is supported by the publication of the terms of the Infanticide Bill introduced into the House of Lords by Lord Dawson on 21st December, 1937. Its main provision is that a verdict of infanticide may be returned where a mentally-disturbed mother kills her child and the child is not over the age of twelve months. (*The Times*, 22nd December, 1937; *do.*, 23rd December, p. 7.)

SOME REFLECTIONS UPON THE FINANCE ACT, 1937

ONE has perhaps to go back to the famous Lloyd George Budget of 1909 to find a parallel to the outburst of bitter criticism which, after the first flush of enthusiasm, greeted the new tax—the National Defence Contribution—proposed by the present Prime Minister in his budget speech of 1937; there was, however, this difference that this novel tax, in its original form, was anathematized not only by the Opposition but also by the great majority of the Government's supporters who, after it had been reshaped once in the interval between the budget speech and the introduction of the Finance Bill, forced its withdrawal and the substitution of a tax, albeit called by the same name, which was entirely different both in its principles and in its scope.

The aim of the original National Defence Contribution was to exact from those concerns, which were making exceptional profits owing to the Government's huge rearmament programme, a special tribute towards the cost thereof; it was considered that where higher profits were being made these could be reasonably considered as the result, directly or indirectly, of rearmament.

The scheme of the original N.D.C. (to use a useful nomenclature) imposed a tax by way of varying percentages of the excess of the profits made in any period ended after 1936 over the average of those earned in the standard years. At the option of the taxpayer he could select any two of the years 1933, 1934, and 1935 or any three of those years and 1936 as the standard years; where a business was commenced between January, 1933, and December, 1936, the standard years were shortened accordingly, but for all businesses begun after 1936, there was to be only one standard of profits, viz. a percentage of the capital employed in the business, normally 6 per cent in the case of companies—by a concession the minimum capital could be taken at a notional figure of £25,000 in order to benefit the smaller businesses. The tax was to be a percentage varying according not only as the profits made in any accounting period were more or less than a percentage of the capital employed in the business but also according as the profits in the standard years exceeded or not this same percentage. Since the proposal was completely abandoned it would hardly serve any useful purpose to analyse its provisions in greater detail.

The tax was attacked as unduly complicated, inequitable as between different businesses, crushing all enterprise and new

businesses and productive of the greatest uncertainty—it was thus claimed that it offended against three of Adam Smith's four canons of taxation; the number of concerns coming under review was estimated at 35,000 and the probable yield at £11,000,000. "Big Business," while recognising the need for extra revenue rebelled against the penalising of energy and enterprise and the singling out of exceptionally *increased* profits terming the tax in effect one on "recovery of trade"! One had the strange spectacle of magnanimity in business—concerns which were not affected by the original N.D.C. stood by the side of their hard-hit brethren and offered, if the Chancellor would only withdraw the tax, to accept one with nearly double the yield but affecting all businesses whether or not they were making abnormal profits. Such magnanimity and apparent generosity was too much for the Chancellor especially as the tax was assailed from all sides both in politics and business—he withdrew it and substituted the present N.D.C. with a minimum yield of £25,000,000; he could not, however, refrain from commenting on the hysteria of the business world at the idea that a tax of £11,000,000 on the total profits of industry which exceeded £500,000,000 could be so fearful as completely to crush all enterprise.

The objections to the tax were obvious; in the case of every concern possibly liable, an exact computation of its capital would be necessary (for Excess Profits Duty this had only been necessary in the comparatively few cases where a profits standard was not employed); the computations would be extremely involved and complicated and it would need a large staff to work the tax with its comparatively trifling yield of £11,000,000 and indubitably the tax would cause a maximum disturbance of business and trade while the concerns involved were but few.

These objections do not seem wholly to account for the intense opposition offered by "Big Business" and their willingness to pay more than double if the tax were spread more evenly. One may conjecture that the real cause of their opposition was the suggestion that, if a concern made more than 16 per cent of its capital, it was profiteering and also a rooted objection to any computation of capital which revived memories of the abortive Capital Levy of 1919 and which might be very useful to a future Socialist government; moreover, unlike a tax on the profits of *all* businesses, the original N.D.C. could not be passed on to the consumer (thus adding to the cost of living) since it was a tax on *selected* concerns and thus in effect a tax on monopoly. This makes the Socialist objection to the N.D.C. in its original form the more extraordinary—Mr. Attlee, M.P., actually thanked the Prime Minister

for "adopting the proposals made from the Opposition side of the House to abandon this ill-advised experiment and to raise a larger sum by a better method"—comment seems superfluous!

In introducing the N.D.C. in its final form, the Chancellor refused to consider a general increase in the rate of income tax, since the basic conception of the National Defence Contribution both in its old and in its new form was that it was to be a tax on industry which as a whole was definitely benefiting from the revival in trade due directly or indirectly to rearmament. The new tax is a flat rate of 5 per cent on the profits of all corporate bodies and of 4 per cent on those of other persons; it was imposed on the profits of all businesses, including investment and property owning companies, carried on in this country or carried on anywhere by persons ordinarily resident in this country—businesses making less than £2,000 are not chargeable while the same allowance as in the original N.D.C. is made for small businesses, viz. one-fifth of the difference between £12,000 and the actual profits of the accounting period. Statutory undertakings, i.e. those whose dividends were limited by legislative enactment, are not liable to the tax; it is difficult to see why they should be exempt and yet concerns which are making no greater profit than before as a result of the national emergency are liable.

The new N.D.C. only charges profits made after 1st April, 1937, as contrasted with those made after 1st January last in the original proposals; the profits are to be computed generally on the same lines as for income tax but with an allowance for annual interest, etc., and the exclusion of investment income apart from the annual value of business property. It includes the profits of all businesses whether or not they are assessable under Schedule D for Income Tax, i.e. agriculture, building societies, investment companies, etc., are brought within its scope. In the case of private companies controlled by their directors, the amount of the remuneration is restricted to 15 per cent of the profits with a minimum allowance of £1,500 and a maximum one of £15,000; individuals and firms can claim this allowance but they are then to be taxed at the higher rate of 5 per cent. There are complicated provisions by which losses for the previous six years, which could be carried forward for the purposes of income tax, can also be deducted from the profits chargeable to N.D.C. as can also the accumulated and unexhausted income tax allowances for wear and tear—these latter provisions are intended for the special benefit of shipowners while the carry forward of losses is to meet the position of those industries just emerging from a period of prolonged depression. Finally the tax is to run only for five years

from April, 1937, thus coinciding with the period of the re-armament programme—no Parliament is bound by the laws passed by its predecessor and one does not have to be a prophet to forecast that the tax will last as long as the Government needs money.

From the economic point of view the chief criticism of the new N.D.C. is that being a tax on the profits of all businesses it can easily be passed on to the consumer and thus increase the already steadily mounting cost of living. As businesses directly benefiting from rearmament are taxed only at the same rate as other businesses the original intention to stop profiteering out of the urgent necessities of the State has been rendered abortive. There are also loopholes for evasion of which the unpatriotic business concern will no doubt readily avail itself; it would hardly be fitting to direct attention to these but attention must be called to a *casus omissus* so obvious that it almost stands out and strikes the least observant. Corporate bodies, by forming subsidiary companies, can reduce their liability since each subsidiary will be treated as a separate entity entitled to its own relief where its profits are less than £12,000—it is true that a principal company and its subsidiaries can be treated as one business for N.D.C. but this is only at the *taxpayer's* option! One may expect to see in the next Finance Act remedial provisions giving the Revenue a similar option and thus closing this gap in the scheme of taxation.

In many ways the new N.D.C. is reminiscent of the Corporation Profits Tax imposed by the Finance Act, 1920; this latter tax, however, only concerned the profits of corporate bodies and included within its scope the whole of their income whether from business or from investments. Apart from minor differences in the mode of computation, there was in the case of C.P.T. a special provision intended to benefit the ordinary shareholder on whom the whole burden of N.D.C. of course falls; the charge upon a company for the purposes of C.P.T. was not to exceed 10 per cent of the profits after deducting, *inter alia*, preference and other similar dividends at a fixed rate and not fluctuating according to the profits—the Chancellor refused to allow a similar relief in calculating the tax payable under the N.D.C. provisions in their final form.

The furore caused by the N.D.C. enabled the remaining provisions of the Finance Act, 1937, to become law with but little controversy; we may notice certain amendments to the tariff dues, the repeal of the manservant duty and, much more interesting, the exemption from death duties granted in the case of land indefeasibly given, subject to certain life interests, to the

"National Trust"; this will undoubtedly have the effect of withholding more beauty spots from the devouring maw of the speculative builder.

In the realm of income tax one must notice provisions intended to stop up further gaps in the Surtax left open despite the stringent provisions of last year's Act in this respect. Avoidance of Surtax by "bond-washing," i.e. the sale of securities cum-div. with a contemporaneous contract to buy them back ex-div. whereby the dividend does not become the taxable income of the beneficial owner, is prevented. The formation of so-called "one-man" companies as a means of avoiding Surtax will as a result of the Act become even less profitable; by means of some exceedingly complicated provisions, so obscure as to be almost unintelligible, it will not be possible to escape Surtax by forming subsidiary companies nor by omitting to make up the accounts of the company, while, in the case of "one-man" investment companies, the attribution of income to individuals for Surtax purposes may be made according to the respective rights of the members of the company on a winding-up as well as to their rights to a distribution of the income.

In introducing the 1936 Budget, the then Chancellor threatened, if legal evasion of Surtax proceeded on the scale of the last several years, to stop up further loopholes *retrospectively;* this threat was made good as regards the last above-mentioned provision and one witnessed the usual objection to retrospective legislation, viz. that the taxpayer might arrange his affairs in accordance with the existing law only to find that his efforts to escape the burdens applicable to his wealth and to throw them on the general body of taxpayers had been in vain.

The province of a critic is not only to point out existing anomalies but also to suggest remedies; in the case of legal avoidance of taxation, it has always seemed to the writer unfortunate that the highest legal authorities have tended to encourage the idea that there is nothing morally wrong in the wealthy reducing their liability to tax by subterfuges within the four corners of the law: *cf.* Lord Sumner in *Levene* v. *Inland Revenue Commissioners,* [1928] A.C. 217: "They incur no legal penalties and strictly speaking no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them"; and Lord Tomlin in *Duke of Westminster* v. *Inland Revenue* (1934), 51 T.L.R. 467; 19 T.C. 490, who said: "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be." As soon as

the Legislature stops up one loophole, the specialist in tax evasion discovers another, and so the process goes on with its interminable complication and almost unintelligible remedial clauses. Surely the time has come for the insertion of an all-embracing provision in the Surtax code, somewhat on the lines adopted for the purposes of the Excess Profits Duty and National Defence Contribution, to the effect that "no regard shall be had to any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the total income of an individual"; this would leave the matter at large for the Appeal Commissioners to regard or disregard all the complicated manœuvres adopted to evade payment of Surtax.

It should be a canon of taxation that as between one taxpayer and another the same tax should be exacted for the same income regardless of the source thereof; owing to technical rules of charge which have come down almost unchanged since 1842, in many instances, receipts of an income nature from the ownership of land escape taxation. We may instance as examples firstly the case of buildings which are unoccupied or in the course of erection; if a rent is paid the recipient thereof cannot be charged by deduction or otherwise since the property from which the rent issues cannot be assessed—this results in a considerable loss of duty especially as regards rents payable under building agreements. Secondly by reason of rents of a number of properties being included in one lease and the total rent exceeding the aggregate of the annual values of the individual properties, the excess may be completely without the scope of the taxing acts (see *Whelan* v. *Leney & Co. Ltd.*, [1930] A.C. 432 and comments thereon in M.L.R., Vol. 1, p. 82); another instance is where the owners of the surface receive in addition to the surface rent a fixed rent and royalty from the person working minerals under the surface—this latter rent is not taxable (*Elliott* v. *Burn*, [1935] A.C. 84). Finally, attention must be called to that not infrequent case where the lessor, immediate or otherwise, of property receives a rent considerably in excess of the current annual value which latter figure is, of course, the notional basis of assessment; examples are the exorbitant rents paid by brewers to obtain possession of tied houses (see incidentally *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1937] 2 All E.R. 298, discussed M.L.R., Vol. 1, p. 164), and those cases where under an old lease a rent is payable far in excess of the present-day value of the property—such excess rents cannot be charged to income tax owing to the artificial basis of assessment and yet they are just as much income, in the

true sense of the word, as that derived by the investor in stocks, mortgages and the like.

In order that all income may be taxed irrespective of its source, a provision seems needed whereby income arising from the ownership of land in excess of that notionally assessed under Schedule A should be liable to assessment by some all-embracing clause on the lines of Case VI, Schedule D, the so-called "sweeping up" clause for profits chargeable under that schedule; the anomaly is in part due to the system of classification of income according to sources which are put in watertight compartments so that income not strictly chargeable under any one schedule is not chargeable at all.

The good luck of farmers in the matter of taxation is notorious; not only are their lands entirely exempt from rating but their income is not assessed at its actual figure but at a purely notional one, equivalent to the rent paid or the annual value of their lands. The farmer has moreover the option of paying on his actual profits in any year but the State cannot charge him, in any circumstances, on more than the rent or annual value even though his profits may be, and often are, very considerably in excess thereof. There are also other anomalies arising from the artificial nature of the assessment of income arising from land; if profits can be ascribed in any way to the occupation of land, they are charged only according to the annual value thereof, *cf. Inland Revenue* v. *Melross*, [1935] S.C. 812, as regards a silver fox farm, and *Lord Glanely* v. *Wightman* (1932), 146 L.T. 474; 48 T.L.R. 213, where the House of Lords held that profits from stallion fees amounting to very considerable sums were inseparably connected with the occupation of land. When one considers the huge subsidies that are being lavished on agriculture it does not seem unreasonable that the State should require, in return, its share of the profits of agriculture computed on the same lines as those normally applicable to any other source of income, viz. the actual profits made.

One final anomaly may be referred to though its remedy would hardly appear to be by way of amendment of the income tax law. A British company, i.e. one incorporated in the United Kingdom, whose sole residence is abroad and which does not carry on any trade in this country, does not come within the scope of the income tax law (*Todd* v. *Egyptian Delta Land and Investment Co. Ltd.*, [1929] A.C. 1)—this is quite proper because the whole basis of our taxation of income is either that the source of income shall be situate, either physically or notionally, in this country or else that the taxpayer shall be resident here. Individual shareholders of such companies who are resident here pay income tax on their dividends but so do they as regards those arising from foreign companies.

There seems something amiss that a company enjoying a British registration and consequently the protection of this country by reason of its incorporation here should yet—apart from the initial stamp duty payable on its capital—contribute nothing towards the cost of such protection. It must be of material advantage to such a company to retain British registration and not avail itself of incorporation abroad and a case certainly seems made out for the imposition of a special annual contribution from such companies either according to their capital or to their income. The protection of the British Government is in these days of alarm certainly worth something and such a tax is therefore hardly likely to cause reincorporation abroad, while it is difficult to see how the resources of the country would in any way be affected if such a company no longer availed itself of British registration.

A. Farnsworth.

FREEDOM OF TESTATION

THE INHERITANCE (FAMILY PROVISION) BILL

The Social and Legal Consequences of the Bill

(1) *Validity of unrestricted testation and inheritance*

The Inheritance (Family Provision) Bill is a measure of considerable social interest. The broadest issue involved is the social and ethical validity of inheritance itself. This implies two claims: the right of free testation and the unrestricted right to take by way of inheritance. It has often been said, and some opponents of the Bill still assert, that free testation is a "natural right"—a necessary incident of property (e.g. Locke)—but this is now untenable with the recognition that private property is also a function of society and should not be employed to the detriment of its interests (e.g. Mill, *Principles*, Vol. I, Bk. II, Chap. II; Laski, *Grammar of Politics*, p. 187, 52–6). Direct legal expression has been given to this more recent view in the Continental law relating to *abus de droit*, sect. 1 of the Soviet Code, and the doctrine *sic utere tuo ut alienum non laedas*, which is the basis of much of the English law of tort. The ethical claim to inheritance rests largely upon that stock picture of anguish, the starving widow and her brood of orphans. But, as a rule, starving widows were the wives of penniless husbands, and the average age of the "orphan" who inherits under his parent's will is about forty. As Mill points out, the only morally justifiable claim which a child has against its parent is to education and training which will fit it for a successful life. The Inheritance Bill to some extent recognises this narrower claim, since its provisions operate not in favour of all sons, but only those who are minors or are through mental or physical incapacity unable to earn a living.

The economic objections to unrestricted inheritance are obvious. It has been a dominant factor in the evolution of extravagantly unequal incomes and a class society ("there is a continuous hereditary transmission of inequality of income . . . ." Cannan, *Wealth*, p. 208), and in the encouragement of idleness on the part of beneficiaries. According to Taussig (*Principles*, Vol. II, p. 249) the right of free testation is a necessary condition for the production and growth of capital, since domestic affection and family ambition are the motives substantially responsible for the accumulation of wealth. But during 1923–5 of those testators who left £100,000 or more, 33 per cent had no surviving child and 23 per cent neither spouse nor children. In fact, the elimination of these incentives would not necessarily result in a dearth of new capital. A vast proportion of the capital of this country is represented by the undistributed profits of companies. Further, the State itself often provides new capital from taxation.

(2) *The consequences of restrictions on testation*

If the arguments in favour of free testation and inheritance are unsound, the question naturally arises whether restricted freedom would ensure more desirable consequences. Wedgwood (*The Economics of Inheritance*, 1929) and Dalton (*Inequality of Income*, 1925), among others, have examined the social effects of limited testamentary power as compared with complete freedom. It should be noted that both were concerned with the system,

which prevails throughout almost the whole world, of giving fixed portions to surviving spouses and children, and, sometimes, other relatives. (For convenience this principle will be referred to as legitim.) The Inheritance Bill does not propose to initiate this system; it would substitute a method, resembling the Roman *Querela inofficiosi testamenti*, by which the Court where it thinks fit could confer a share of the estate upon certain applicants.

(*a*) *Inequality of wealth.* It is sometimes said (e.g. Rignano and Stamp, *The Social Significance of Death Duties*) that legitim produces less inequality of wealth. De Tocqueville (*Democratie en Amerique*) wrote that under the "incessant activity" of legitim "the bulwarks of the influence of wealth are ground down to the fine and shifting sand which is the basis of democracy." This, however, is untrue, since the families of the rich tend to be very small, and an only son may inherit from both his parents and his childless relatives. The difference between free testation and legitim with respect to the inequality of income has been much exaggerated. Even if legitim were less favourable to the concentration of wealth, it would do nothing to break down the barriers of class, since the diffusive effect will make itself felt only within the class which already owns the property. The most that a rigid observance of legitim can achieve is the prevention of enhanced inequality of inherited wealth, that is to say, if it does nothing to secure greater equality, it also does nothing to promote further inequality.

(*b*) *Production.* Sidgwick (*Principles of Political Economy*) has said that free testation reduces work and saving by beneficiaries, and legitim has the same effect on testators. It is true that if fortunes are large or inherited at an early age, legitim will certainly encourage idleness, but it should be remembered that the birthrate of the rich is usually low. Where the birthrate is higher, this according to De Tocqueville, will often induce a testator to sell his property in his lifetime, since he will not wish to see his business carved into numerous shares. This factor, coupled with the alleged diffusive effect on wealth, led him to conclude that legitim must result in slackened production and the decrease of wealth. The fallacy, as Wedgwood points out, is in the assumption that the total property in a community will remain the same as population increases. De Tocqueville was thinking of land, and actually if population does increase, children must inherit less land than their fathers. It is quite true that in some agricultural communities in which the compulsory distribution of property prevails land tends to be so subdivided that, in the words of a critic of the Bill, holdings resemble Euclidean lines, having length without breadth. Even if De Tocqueville's assumption is accepted, the value *per acre* of whatever land is available will appreciate and, of course, his argument will not apply to other forms of wealth. In most agricultural communities, however, legitim has a very discouraging effect on the birthrate, so that the process of subdivision is considerably retarded (e.g. Gotland, in Sweden). Here again, then, the effect of legitim is not pronounced.

(*c*) *Charitable bequests.* It would appear at first sight that legitim must reduce the number and extent of bequests outside the family. Actually, even in England very little is left in this way. Wedgwood has calculated that less than 6½ per cent of the total property disposed of by will is bequeathed away from the family, and this figure covers both charitable and non-charitable gifts. "In England, whoever leaves anything

beyond trifling legacies for public or beneficent objects, when he has near relatives living, does so at the risk of being declared insane by a jury after his death, or at least of having the property wasted in a Chancery suit to set aside the will" (Mill). In France about 5½ per cent of the property left by will is diverted from the testator's family. Legitim, therefore, appears not to have had an unduly restrictive effect on charitable bequests, and in any case gifts to charity are usually made by testators who, having no descendants or near relatives, are not impeded by legitim in the free disposition of their property.

One may fairly conclude with Dalton that "no important reduction of inequality, or other incidental advantage, is to be anticipated from the adoption in this country of the legitim in its ordinary European form." If the social and economic consequences of legitim are negligible, it is reasonable to suppose that the effects of the system proposed by the Bill will be even less noticeable. This is particularly true with respect to production and inequality, since maintenance is payable only from income where the estate is over £2,000. It may be paid from capital where the estate is less than that sum, but not where this would necessitate a realisation that would be improvident having regard to the interests of dependants and anyone named as a beneficiary by the will. On the other hand, since the income payable under the Bill may be up to two-thirds of the total income from the estate, this may deter anyone to whom a business, farm or practice is given by the will from using his best endeavours in its management.

(3) *Judicial description and fixed portions*

It is usual to consider one's own system of law as natural and normal, and for that reason most English lawyers consider freedom of testation as the necessary and usual incident of ownership. Apart even from curtesy and dower, this freedom is not an ancient doctrine of our law. It is, moreover, the product of historical accident. (Keeton and Gower, *Freedom of Testation in English Law*, Iowa, L.R. XX, 326.) Before the establishment of the use there was no power to devise land, and this at one time was quite clearly for the protection of the tenant's offspring. With respect to chattels there was no power of free testation until some time in the fourteenth century. If there was a surviving wife she was entitled to one-third; if a wife and children she took one-third and the children among them another third. This principle survived in Wales until 1696, in London until 1724, and apparently in Chester until 1925. It is, of course, a subsisting feature of the present law of Scotland.

In recent years there has been a movement afoot to introduce limitations on testation in favour of the testator's family. Viscount Astor in 1928 moved that an inquiry be conducted into the desirability of such a measure. Viscount Haldane, the Lord Chancellor (Lord Hailsham), Lord Merrivale and Lord Buckmaster spoke against the motion, Lord Buckmaster on the ground that any law of this kind was a mere tinkering with the problem, the real solution being the evolution of true economic independence for women. (A view since expressed in the House of Commons by Mr. Gallacher.) At the last census less than 10 per cent of the women of this country were supporting themselves by their own efforts. The motion was withdrawn. In 1931 a Joint Select Committee reported against the advisability of introducing legitim, although it expressed a cautious tepid preference for a discretionary method. In 1934 a Bill based

upon this recommendation faded out after the Committee stage. The 1937 Bill is an attempt to resuscitate it, and looks more likely to succeed than its predecessors.

English law in its present insistence on free testation is in marked disharmony with most other legal systems. An analysis of De Bourbousson (*Du Mariage, des Regimes Matrimoniaux, des Successions*, 1934) reveals that of the twenty-eight systems there compiled (exclusive of the U.S.A.), twenty-three contain restrictions on testation. The recalcitrants apart from Great Britain are Japan, Peru, Sweden and Turkey. (It has been assumed that the author's silence on the topic indicated the absence of restrictions.) This summary refers only to restrictions in the nature of legitim, and takes no account of curtesy and dower, community of goods, dotal property, "homestead" rights, etc., which also operate to limit free testation. In the United States eight States apparently provide portions for dependants, although almost all of the forty-nine jurisdictions have adopted restrictions in one or more of the other forms. The significant feature of the thirty-one systems which limit free testation is that twenty-nine of them provide fixed portions for certain beneficiaries (although there is no uniformity in their selection). Only the State of Maine gives the judge an unhampered discretion to allot part of the testator's estate to certain named applicants. Massachusetts confers a similar but much more limited discretion upon the courts. The discretionary method does, however, exist in a few other systems not noted by De Bourbousson—New Zealand, some of the Australian States, and some of the Canadian Provinces.

The overwhelming preponderance in favour of fixed portions raises a serious doubt whether legitim is not to be preferred to judicial discretion. It has been suggested that the social effects of a discretionary principle would be even less than the slight effects of legitim. There is, however, one consequence of the proposed method which is absent in the case of legitim. It has been strenuously argued in opposition to the Bill that it will operate as licence to litigate, and since it is rare to find anyone who is satisfied with what he gets under the will of a relative, we may expect a glut of unpleasant actions. Estates will be drained in legal costs. Moreover, it will be difficult in these actions to ascertain the reasons why the testator disinherited a particular dependant, since he is unlikely to place on record the unhappy circumstance which led to such drastic action. This argument has probably received more attention than it deserves. It should be noted (i) that the discretion which the Court possesses under sect. 171 of the Law of Property Act to alter a lunatic's will is usually exercised in Chambers; (ii) that any provision in the nature of that proposed in the Bill will deter testators from making unjust and therefore ineffective testamentary provisions; (iii) that it is no criticism of a new remedy that experience subsequently confirms its necessity. Quite apart from these theoretical considerations, the argument appears unsound in the light of the experience of those parts of the Empire where the discretionary principle is applied. In the last five years the average number of wills proved per year in New Zealand has been 4,396, and the average number of those contested under sect. 33 of the Family Protection Act, 1908, has been 77. The proportion of contested wills is therefore about 1·75 per cent of the total number. It is a little difficult to estimate the possible number of complaints against wills which would be litigated in this country. The proposed remedy would not affect the very rich, for whose provision marriage settlements are

usually made, nor the very poor, for whose benefit Widows' and Orphans' Contributory Pensions Schemes exist. It is likely to apply mainly to fortunes of a few thousand pounds. This view is supported by a newspaper inquiry conducted by the National Union of Societies for Equal Citizenship. (See 1931 Committee's Report of Evidence, p. 2.) Daniels and Campion (*The Distribution of National Capital*) have calculated the number of estates (testate and intestate) passing at death in Great Britian during the years 1924–1934. The average number per year is as follows—

Over £100	122,643
£100–£1,000	77,913
£1,000–£10,000	36,885
Over £10,000	7,844

According to Wedgwood the proportion of all decedents dying in 1924–5 at the age of 25 or over was as follows—

Under £100	73·8 of all decedents owning	4% of the total property
£100–£1,000	16·78 „ „ „ „	6·2% „ „ „ „
£1,000–£5,000	6·40 „ „ „ „	14·1% „ „ „ „
£5,000–£10,000	1·41 „ „ „ „	10·0% „ „ „ „
£10,000–£25,000	1·00 „ „ „ „	15·6% „ „ „ „
£25,000–£50,000	·34 „ „ „ „	11·8% „ „ „ „
£50,000–£100,000	·15 „ „ „ „	9·9% „ „ „ „
Over £100,000	·102 „ „ „ „	28·4% „ „ „ „

When coupled with Wedgwood's calculation that only 6½ per cent of the property left by will is given outside the testator's family, and the experience of New Zealand, these figures do not indicate any alarming increase in litigation. This prediction is supported by the evidence of the Public Trustee before the 1931 Committee. He stated that the number of capricious wills passing through his office was negligible. It is safe to assume that the number outside was smaller. It should also be noted that more than half of the wills with which the Public Trustee Office deals relate to estates of £5,000 or less.

On the whole then no very startling consequences are to be anticipated should the Bill become law. There will be a little more litigation, a few more promiscuous unions (since daughters and spouses are not to benefit on marriage or remarriage), and a few more dispositions *inter vivos* with a consequent loss to the Treasury.

(4) *Some legal criticisms of the Bill*

(*a*) One objection to the Bill is that it represents a reactionary attitude in its treatment of the sexes. It is contrary to the spirit of equality between the sexes reflected in such recent measures as the Sex (Disqualification Removal) Act and the Law Reform (Married Women and Joint Tortfeasors) Act. It does not distinguish between surviving spouses as potential beneficiaries—although in practice this is discriminatory since from three-fifths to two-thirds of the property of this country is owned by men—but it does distinguish between sons and daughters. All unmarried daughters are to benefit, whether minors or not, whereas sons are not within the scope of the reform unless they are infants or disabled from earning a living. Apparently the son of 21 who is still at a University, or about to be articled in a profession may be left without provision for his further training, although his sister of more mature years who considers herself too genteel to work may claim maintenance for as long as she cares to remain unmarried. The 1931 Act proposed portions for all children under 23, and for any sons or daughters over that age incapable of self-support.

(*b*) The Bill is vague on the principle the judge is to apply, and the

factors he is to take into account in his application of that principle, whatever it may be. The main objection is that although the Bill speaks of reasonable provision for maintenance, it is not clear whether this is to be assessed with respect to the actual requirements of the applicant, or the station in life of the testator. The Privy Council has just decided in interpreting a similar Australian statute, that "proper maintenance" is to be assessed with respect to the testator's fortune and social status. The court in assessing "maintenance" is to take into account any income provided by the testator under a settlement, any other income of the applicant, the conduct of the applicant, the testator's reasons for making the dispositions of the will, "and any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to the applicant, to the beneficiaries under the will, or otherwise." The result will be that Mr. Justice X will acquire a reputation for sympathetic treatment of applicants, and Mr. Justice Y for sympathetic treatment of the will. It is legitimate to wonder whether it would not be preferable to avoid such an undesirable consequence by fixed portions which could be scaled down in certain specified circumstances or totally set aside for specified reasons. The courts will themselves in time provide fixed rules by way of precedent; it would therefore seem wiser to eliminate this process of trial and error by the inclusion of more specific directions in the Bill. The Chancery judges themselves were confident in 1931 that they could exercise a wide discretion. Mr. Justice Bennett writing to Lord Thankerton, the Chairman of the Joint Select Committee, said that "the Judges of the Chancery Division do not think that there would be any real objection to a measure which enabled a Court in a case where no adequate provision had been made for a spouse or infant children to order proper provision to be made for them out of the deceased's estate having regard to all the circumstances." Many systems provide for the disinherison of those who would take fixed proportions. Swiss law declares that they may be disinherited for any grave offence against the testator or his relatives, any refusal to assist him or any bad treatment of him, and the reason relied upon must be stated in the will. It is true that this method reduces flexibility of provision, but it secures certainty and avoids litigation. The Spanish system of *mejora* is also worthy of study. By means of it the testator must provide a small portion of his estate for certain named beneficiaries, and has a discretion to apply a further portion in any way that he pleases among them. It is interesting to note that in South Carolina a testator is restricted in the amount of property he may leave to his mistress or illegitimate children.

(*c*) The Bill contains no provision for preventing evasion of its principle by dispositions *inter vivos* or *mortis causa*. The alternative would be some provision in the nature of sects. 172 and 173 of the Law of Property Act, 1925, or sect. 42 of the Bankruptcy Act, 1914, or the revival of the old doctrine of dispositions in fraud of marital rights. Something along these lines would be troublesome but advisable. Article 785 of the Austrian Code, which is the culmination of a series of attempts to cope with this problem provides that in assessing the estate, gifts *inter vivos* made less than two years before the will are to be taken into account, but not those made when no child entitled to a portion was in being, or those which do not reduce the capital,

(*d*) The Bill says nothing of the abatement of testamentary gifts to meet the provision of maintenance ordered by the court. If the court

orders that more capital or income is to be paid to an applicant, that property must be diverted from a beneficiary under the will. Abatement pro rata of all gifts is one possibility. By Articles 923 and 926 of the French Civil Code abatement is *pro rato* unless the testator has expressed a preference for one particular legacy, and property passing under the will is exhausted before recourse is had to donations *inter vivos*. Article 523 of the Swiss Code declares that donations *mortis causa* are exhausted first and then dispositions *inter vivos*, the more recent abating before the more remote.

JOSEPH GOLD.

The Bill compared with the New Zealand system

In view of the doubts which have been expressed as to the way in which the provisions of the Bill will work in practice, it may be helpful to compare these with the corresponding legislation in New Zealand where the system has been in force for many years. This system is in essentials the same as that now being introduced into England except that the Court has a complete discretion as to the amount and nature of the provision which it makes, and that it can exercise the discretion in favour of a spouse and children without restriction.

The main Act now in force is the New Zealand Family Protection Act of 1908, which was a consolidation of earlier legislation. This Act was subjected to a searching analysis by the Court of Appeal in *Re Allardice, Allardice* v. *Allardice* (1910), 29 N.Z. L.R. 959. Certain rules had been laid down in earlier decisions and were summarised by Stout, C.J., as follows—

(1) The Act is something more than a Destitute Persons Act [which approximates to the English Poor Law].

(2) It does not empower the Court to make a new will for the testator.

(3) It allows the Court to alter a testator's disposition of his property only so far as is necessary for the proper maintenance and support of the wife, husband, or children, where adequate provision has not been made for their proper maintenance and support by the will.

(4) In the case of a widow at all events—if not in the case of a widower—the Court will make more ample provision than in the case of children if these are physically and mentally able to maintain and support themselves.

The Chief Justice added that the Court had to consider the means of the applicants, their need of maintenance and support, and the value of the testator's estate. The station in life of the testator and the applicants was relevant, likewise the health, sex, ages, earning-power, and resources of the latter and how they had been maintained in the past. The whole circumstances had to be considered. Edwards, J., in his concurring judgment thought that the Court should so far as possible place itself in the position of the testator, and consider whether or not having regard to all the surrounding circumstances the testator had been guilty of a manifest breach of that moral duty which a just but not a loving husband or father owes towards his wife or children; if the Court finds him guilty then it should make such order as appears sufficient, but no more than sufficient, to rectify the position.

On appeal to the Privy Council, the Board approved the general view taken by the Court below as to the proper scope and application of the

powers conferred by the Act, and declined to interfere with the order making provision for married daughters in poor circumstances, but refusing it in the case of able-bodied sons.

The principles enunciated in this case have been applied and illustrated in subsequent cases. In *Glascow* v. *Glascow* (1911), 13 G.L.R., the Court increased an annuity of £80 left to an invalid son to the sum of £3 per week, but refused to increase a gift of £100 to a daughter who already had property worth about £600. In *Public Trustee* v. *Denton*, [1917] N.Z. L.R. 263, the Court set aside a gift of a freehold property to a charity and gave it to the widow who was in poor health, incapable of earning, and of scanty means. This is a strong case as the testator had separated from his wife three months after marriage. It was held in *Re Heagerty*, *Heagerty* v. *Considine* (1915), 34 N.Z. L.R. 905, that on an application by a widow the Court will take into consideration the help given by her in the accumulation of the testator's estate, and will not reduce her mode of living. In *Public Trustee* v. *Brown*, *ibid.*, 951, the testator in a will made before the birth of his youngest son, left his property in trust for his two elder sons. The Court gave the youngest son an equal share with his brothers. Reference should also be made to the very recent case of *Bosch* v. *Perpetual Trustee Co.* (*The Times*, 23rd February, 1938). There the testator left £257,000. He bequeathed £10,000 and an annuity of £1,000 (reducible to £500 on re-marriage) to his widow, and £15,000 on attaining 25 to each of his infant sons. The Australian courts increased the widow's legacy to £33,800, and her annuity to £2,000 not reducible on re-marriage, but refused to increase the son's legacies. On appeal, the Judicial Committee increased their legacies to £25,000 each and pointed out that the Act speaks of "proper maintenance" and that "proper" means something more than merely adequate.

Sufficient has been said to illustrate the manner in which the discretion conferred upon the Court has been exercised. Opponents of the English Bill in the debate on the second reading quoted a number of hypothetical cases where they suggested that it would be unjust for the testator's wishes to be set aside. But the Court may be trusted to refrain from exercising its discretion in these cases, or only to do so subject to conditions appropriate to avoid injustice. The New Zealand Act has worked well in practice and has been the means of remedying flagrant cases of injustice; there is no reason to suppose that a similar Act would not be equally successful in England.

The most substantial objection put forward was that large portions of estates will be swallowed up in legal fees, etc., and that the Bill will give rise to unsavoury litigation involving the washing of a large amount of dirty linen in public. But, as the mover of the Bill maintained, in ninety out of every hundred cases a compromise will be reached without the necessity of taking the matter to Court. Moreover, the mere presence of such an Act on the statute book will compel a testator when drawing up his will to show greater care and consideration in the disposition of his estate, and so to obviate so far as possible any suggestion that he or she has failed in his or her moral duty as a just parent or spouse. It must also be remembered that publicity is now given to cases where relations seek to upset a will on the grounds, say, of undue influence or lack of testamentary capacity, and there does not seem to be any logical reason for opposing the Bill simply because of this feature. On the contrary, a certain amount of publicity is beneficial if only to impress on the minds of testators the

moral responsibility they owe to their families, and to warn them that if they fail in their duty there is an Act which can be invoked to ensure that justice is done. In New Zealand, actions under the Family Protection Act have not resulted in any large increase of litigation, nor do they represent an undue proportion of the cases that come before the Courts for decision. Taken over a period of 5 years—

The average number of wills proved annually	= 4396
The average number of wills contested annually under the Family Protection Act	= 77
The percentage which those contested bear to those proved annually	= 1·75%

In the absence of the Act it may be assumed that some at least of the applicants in the 77 cases referred to above would have contested the wills on the grounds of undue influence, lack of testamentary capacity, etc., and that actions on these grounds will also tend to diminish in England.

In conclusion it may be mentioned that by sect. 26 of the Statutes Amendment Act, 1936, in the New Zealand Act "the term *children* shall be deemed to include illegitimate children provided that the Court is satisfied that the paternity or maternity of the testator . . . of any such illegitimate children has been admitted by or established against the testator in his lifetime." The English Bill though it expressly extends to legally adopted children, does not in its present form extend to any illegitimate children, nor, as was pointed out in the House of Commons, to the unmarried mother.

J. L. Robson.

The Bill compared with the Continental systems

Continental writers on comparative law find it difficult to explain why —unlike any other European system of law—English law has so far omitted to protect a testator's family against arbitrary dispositions by will. The fundamental idea underlying the law of "*réserve légale*," "*Pflichtteil*," etc., in all Continental countries is that the law, not the judge in the individual case, should define the limits within which a testator may deprive his family of the benefit of his estate, but there are wide differences as to which members of the family should be compulsory beneficiaries, and also with regard to the legal technique applied. As to the latter we can distinguish two forms of restrictions. French law divides the estate into two portions, *quotité disponible* and *réserve*, permitting the testator to dispose of the former, but entirely precluding him from any testamentary capacity with regard to the latter, while in Germany the testator is free to give away the whole estate, subject however, to a compulsory pecuniary legacy in favour of the protected beneficiaries amounting to half of their share in case of succession *ab intestato*. As regards the members of the family qualified to take as compulsory beneficiaries we find that the legitimate issue is among them in all countries, while even illegitimate children can take advantage of these provisions in some countries in varying degrees. Parents are protected in all countries, except Sweden, and the scope of the provisions is extended to grandparents and more remote ancestors in France and Austria, but not in Germany and Switzerland. Brothers and sisters and their issue enjoy the benefit of compulsory

heirship in some Swiss Cantons, but in none of the larger jurisdictions. The position of the spouse is peculiar. While fully protected in Germany, he or she is excluded from the *réserve* in France, Belgium, Holland and other systems influenced by the Code Civil, though hardships are not likely to arise in view of the law of family property (*communauté des biens*). It is also remarkable that the freedom to dispose by will in favour of the spouse to the detriment of the issue is larger than in case of dispositions in favour of strangers. In Germany the compulsory portion bears a fixed ratio to the value of the beneficiary's share in a case of intestate succession, while in France the *réserve* is determined as a fixed proportion of the estate, e.g. one child takes one half, of the estate compulsorily, two children take two thirds, and three and more children three fourths, as their *réserve légale*. If a testator disposes of property beyond the *quotité disponible* in France, or if, in Germany, he deprives any of the family members protected of more than half of the share they would have received on intestacy, the burden of the reduction is shared rateably by the residuary and specific legatees under the will, unless indeed the will distributes the burden in another way. The details are highly technical and do not call for discussion here. Both French and German law contain provisions to the effect that gifts *inter vivos* made by the testator are taken into account when measuring the value of the *réserve légale* or *Pflichtteil*. The sum total of these gifts is added to that of the estate proper, a kind of "swelling the assets." The amount so arrived at forms the basis for the calculation of the protected portion from which the amount received by the protected person himself during the testator's lifetime is then again deducted. In Germany no gift *inter vivos* is taken into account unless it was made within ten years of the testator's death (Switzerland five years), but no such limit exists in France.

Most laws give the testator the power to deprive a family member of his protected portion as a punishment for certain moral offences. German law, for instance, enacts that a descendant can be deprived of his *Pflichtteil* if he has committed certain specified crimes against the testator or his spouse or if he has maliciously omitted to fulfil his legal duty to support the testator or if he has led a dishonest or immoral life without the testator's consent. A spouse may be deprived of his (or her) compulsory portion if he has given the testator a ground to petition for a divorce though there need not have been any divorce petition in fact. Apart from these provisions enabling the will to override the "compulsory portions" provisions by way of punishment, there is also the *exheredatio bona mente* by which the testator can deprive a prodigal or indebted descendant of his compulsory portion in a restricted and highly technical manner, a provision fulfilling to a certain extent the function of the "discretionary trust" in this country. These provisions, it is submitted, represent the maximum of discretion with which a judge should be entrusted in matters of this kind. A highly discretionary character of remedies given to members of the family (such as that envisaged in the English Bill) may easily work in practice as an incitement to the most unpleasant sort of family litigation.

None of the Continental legislations, as far as we can see, differentiates in any manner between estates according to their value. It is said on the Continent that the English lack of provisions protecting the family is only explicable in view of the habit of the upper classes to settle property by marriage settlement. If this is true the Bill now before Parliament would

seem to be likely to operate mainly in respect of estates of medium size. Neither the very rich nor the very poor will be affected by the Act. It is all the more surprising that the claims of the protected family members, according to the Bill, are to be satisfied out of income except in the case of estates below £2000.

It should be added that in most Continental systems the claims of the protected family members are statute barred after a comparatively short period from the testator's death.

O. KAHN-FREUND.

The Bill and Private International Law

It is gratifying that the question of the local boundaries of the Bill is not ignored. Guidance on this point was particularly necessary since case law could not be relied on owing to the novelty of the provisions so far as English law is concerned. The question is dealt with by Section 6, which reads as follows: "This Act shall not have effect in the case of a testator dying domiciled outside England."

There is no doubt that the vast majority of cases which may arise are adequately covered by this Section. On the other hand, in its present form it is bound to give rise to certain difficulties. Most of these arise owing to the fact that succession to *immovables* is governed not by the law of the domicil but by the law of the *situs*. If, for example, a testator dies domiciled in England leaving immovables in France and being survived by infant children who are "dependants" within the meaning of the Bill, must the English Court in the exercise of its discretion take into consideration the fact that there are French immovables which are governed by French law under which the children will be entitled to fixed portions? In view of Section 6, apparently it must, and this view is supported by Section 1 (1) which provides that: "The Court shall . . . have regard to any past present or future income of the applicant from any source . . . and to any other matter or thing which . . . the Court may consider relevant or material in relation to the applicant. . . ." It is submitted that if conflicts with foreign courts are to be avoided it would be better to leave the foreign immovables and foreign laws entirely out of consideration. The question is not really analogous to the doctrine of election which depends on the presumed intention of the testator. Here, the question of his wishes is irrelevant, and it is submitted that the objects of the Bill ought only to be applied to those assets which fall to be distributed according to English law.

Other difficulties arise in the converse case: If a testator dies domiciled abroad leaving immovables here, under Section 6 it is clear that the Bill cannot apply however large a fortune the deceased may have left invested in English realty or leaseholds. This seems to be absurd and unjust.

Even in the case of movables, difficulties may be caused. According to certain foreign legal systems succession is governed not by the law of the domicil but by the law of the deceased's nationality. In these circumstances the English Courts have at present dealt with the question of *renvoi* which arises by applying whatever law the courts of the foreign domicil would in fact apply (*Re Annesley*, [1926] Ch. 692, *Re Ross*, [1930] 1 Ch. 377, *Re Askew*, [1930] 2 Ch. 259). Assuming that these courts apply English law, the English Courts will do likewise, but though they apply English law in general, apparently they cannot apply the

provisions of the Bill owing to the express words of Section 6! It seems objectionable that a wealthy Englishman can escape from the ambit of the Bill by acquiring a foreign domicil especially as he may also avoid the application of the foreign rules as to fixed portions for dependants owing to the retention of British nationality. Exactly the same difficulties may arise even if the law of the foreign domicil does adopt the rule that succession is governed by the *lex domicilii* since it may take a different view from the English Courts as to what constitutes domicil (*cf. Re Annesley, supra*).

In view of these difficulties, it is suggested that the following should be substituted for the present Section 6: "This Act shall only have effect so far as the English law of succession is to be applied." This, or an equivalent wording, would obviate all the difficulties and inconsistencies referred to above.

W. Breslauer.

THE ACCUSED

AN INTERNATIONAL SURVEY

One of the most valuable and enduring aspects of the work done by the League of Nations has been that relating to medical research and public health. An effort is now being made to persuade the League to extend its investigations into other and more purely sociological fields, some of which are of great interest to lawyers. For example, the Howard League of Penal Reform has received during recent years many complaints of third degree methods, and even of actual torture, perpetrated against persons accused of criminal offences in the interval between arrest and trial for the purpose of extracting evidence against them. This is a very old problem, but the proposal that it should be taken up and investigated by an impartial international body such as the League of Nations marks a milestone on the road of progress in this matter.

To this end the Howard League has prepared a memorandum entitled *The Accused, An International Survey*, which has been placed before the governing authorities of the League of Nations and which it is our purpose to review shortly here. It will come as an unpleasant shock to most people in this country to know that it is the considered opinion of the authors of this memorandum that "the use of torture is more widespread to-day than it was half a century ago; the evil is not extinct but growing."

Instead of attempting any direct investigation of the prevalence of torture, the Howard League have considered that the best approach is to commence by making an inquiry into the opportunities which exist for ill-usage and torture under the criminal procedure of the different states and of the legislative measures which exist for preventing such ill-usage. In order the better to set the matter on foot a questionnaire has been drawn up which has been circulated to knowledgeable persons in almost all the civilised communities of the world for the purpose of elucidating—

(1) who has the custody of an untried prisoner,

(*a*) before he is brought before an examining magistrate or other judicial authority? and

(*b*) during the preliminary investigation by the examining magistrate or other judicial authority?

(2) Are there any rules restricting interrogation by the police of the untried prisoner

(*a*) before he is brought before an examining magistrate or other judicial authority?

(*b*) during the period in which he is under examination by the examining magistrate or other judicial authority?

(3) Is there in law or in practice any limit to the time

(*a*) before a prisoner is brought before an examining magistrate or other judicial authority?

(*b*) before a prisoner is brought to trial?

(4) What is the procedure in cases where the arrested person is not brought before any judicial authority?

In the short space at our disposal it is not possible to give more than the briefest analysis of the answers to these questions. In regard to question (1) during the first period the custody of the untried prisoner is naturally in all cases in the hands of the police. During the second period the prisoner is sometimes in the custody of the judicial authority and in other cases in prison, and it is very seldom that the police have any right to interrogate the prisoner during that period. It is stated that in Bulgaria an illegal habit has grown up of returning prisoners to the police cells. As a rule the prison authorities are apparently independent of the police, but in some cases this matter is not made clear, and obviously requires further investigation.

The position under question (2) is not so satisfactory. In the majority of countries there appear to be no rules at all regulating the conduct of the police as regards the interrogation of prisoners who are in their custody. Even in what may be called the democratic countries of Western Europe the rules of procedure seldom protect the prisoner beyond forbidding compulsion and ill-treatment. The British system of issuing explicit instructions to the police, under which very limited examinations can take place, prevails over most of the British Empire and is paralleled in a few other countries such as Holland and Denmark. In other countries such as Russia and Austria the police are allowed to interrogate but must do so subject to the rules observed by the judicial authorities. It is interesting to observe that in Roumania the police are expressly prohibited from taking any action which would induce a person to commit a crime. The *agent provocateur* is unfortunately not unknown in this country where the adoption of this Roumanian rule might well be considered.

During the second period, that of judicial examination, interrogation by the police is excluded in almost all cases. There are, however, a few countries where it is permitted under the control of the judicial authorities and this clearly opens up possibilities of abuse, where, as is sometimes the case, the police and the examining magistrate are working hand in hand.

The position in regard to bringing the prisoner speedily to trial is in almost all countries theoretically good, that is to say, rules exist requiring that persons shall be brought before a judicial authority within a very short period of his arrest, usually either 24 or 48 hours. There are many complaints however as to the non-observance of these rules, especially in countries under autocratic government.

With regard to the second period, that between examination and trial, the situation is much less satisfactory. The possible periods vary very greatly and in some cases there is no time limit, as in Germany under the present regime, and, rather surprisingly, in some cantons of Switzerland. This obviously opens up possibilities of abuse.

The fourth question which was intended to discover whether there are cases of arrest under administrative decree, as opposed to the ordinary process of law, seems unfortunately to have been misunderstood in a number of cases. Broadly speaking, however, the answers reveal a very significant fact that in practically all the democratic countries there are no cases where it is possible to arrest a person without the obligation of bringing him before a judicial authority for trial according to the law of the land. In all the other countries, however, provision for such arrests exists, but it is sometimes mitigated, e.g. by a provision that the prisoner is not to be kept beyond a certain period as in Latvia and Lithuania. Cases where there is complete *carte blanche* to keep a prisoner indefinitely without bringing a charge against him naturally include the three states of Italy, Germany and Russia. It is with a shock, however, that one finds Northern Ireland included in this black list although there does not appear to be any reason to suppose that the powers granted to the government of that State are very much used.

The above analysis has been confined, owing to shortage of space, to the position in Europe. The replies to the questionnaire which have been received cover practically all civilised communities and suggest that apart from a few states in South America the position is in theory at any rate fairly satisfactory.

It is pleasant to note that the memorandum of the Howard League, together with the answers to the questionnaire, having been brought before the Assembly of the League of Nations in October of 1937, it was agreed that the question of the treatment of the untried prisoner required further discussion and should be referred to the Secretary General for inquiry.

R. S. T. Chorley.

STATUTES

The Factories Act, 1937

The Factories Act, 1937, which comes into force on 1st July, 1938, may be regarded from three points of view, in that it consolidates a good many earlier Acts, simplifies the basic definitions used, and introduces some important amendments. It has long been overdue. In 1924 and again in 1926 Bills with similar objects were introduced, the former by a Labour Government, and the latter by a Conservative Government, but both on the same general plan as the present Act.

The last general factory legislation before the Act of 1937 was the Factory and Workshop Act, 1901. The Factory and Workshop Act, 1907, revised the definition of a domestic workshop, introduced new provisions for laundries, and dealt with labour in charitable institutions. Legislation dealing with particular industries was contained in the White Phosphorous Matches Prohibition Act, 1908, the Factory and Workshop (Cotton Cloth Factories) Act, 1911, which was superseded by a similar Act of the year 1929, and the Women and Young Persons (Employment in Lead Processes) Act, 1920. All these Acts are repealed, and their contents with some amendments are included in the Act of 1937. But this is not the whole story. Welfare Provisions which are to-day considered a most important part of factory legislation were introduced by what may aptly be called "hole and corner" methods. In the middle of the War Period an "omnibus" Act, entitled the Police, Factories, etc. (Miscellaneous Provisions) Act, 1916, was passed with three sections (7, 8, and 9) dealing with factories. Section 7 empowered the Home Secretary to make Orders on various matters affecting the health, safety, or general well being of factory workers. These orders, of which there are now a considerable number, have come to be known as Welfare Orders. Then a few years later the passing of the Workmen's Compensation Act, 1923, was made the occasion of some general legislation as to First Aid equipment in factories. The relevant sections of these two Acts are repealed and re-enacted, and the welfare provisions with additions now appear as Part III of the Act of 1937 with the heading Welfare (General Provisions).

But the consolidation is not as complete as it might have been. The Employment of Women, Young Persons, and Children Act, 1920, was passed primarily to give effect to some of the agreements contained in the Washington Labour Convention, which covered the whole field of industry. The opportunity was taken in sect. 2 to legalise the two shift system for women and young persons of the age of 16 and upwards in factories and workshops. Sect. 2 was repealed by the Employment of Women and Young Persons Act, 1936. As this latter Act is merely concerned with factories and workshops it should have been consolidated with the Act of 1937.

Simplification of definition and classification was badly needed. Factory legislation began with textile factories. Then it was extended to print works but with different hours and conditions of labour. Next a group of trades ancillary to the textile trades was dealt with in a series of five Acts all having slightly different provisions. Finally, factories and workshops in general were brought in, and domestic factories and workshops and women's workshops were recognised as separate classes. It was not surprising that the Act of 1901 provided five sets of regulations as regards

hours of work. In the Act of 1937 it will be noticed at once that the title becomes the Factories Act as contrasted with earlier Factory and Workshop Acts. The term workshop does not appear in the Act, but the distinction still remains for one purpose. Thus in sect. 8 we read that the foregoing provisions of this part of the Act relating to cleanliness, overcrowding, temperature and drainage of floors as respects *any factory in which mechanical power is not used* are to be enforced by District Councils instead of by the Home Office. Again the distinction between textile and non-textile factories is not entirely eliminated. Thus section 112 of the Act of 1937 reproduces section 116 of the Act of 1901 which requires "particulars" of work and wages to be given to piece-workers in textile factories, and subsection 6 contains the definition of a textile factory. The terms domestic factory and domestic workshop disappear, but the phrase "factories in which the only persons employed are members of the same family dwelling there," is used in section 46 to exempt such workplaces from the general power conferred on the Home Secretary to make Welfare Regulations.

The "women's workshop" disappears as a separate class.

The substantive amendments of the law are to be found mainly in the sections devoted to safety and hours of work. As regards safety, since 1901 mechanisation has made great strides, and for the first time there is general safety legislation in regard to hoists and lifts, chains, ropes and lifting tackle, steam receivers, air receivers, and gas holders. Some of the older legislation is much amplified. For instance section 11 of the Act of 1901 dealing with steam boilers covered half a page, while section 29 of the Act of 1937 dealing with the same subject covers four pages. As regards hours of work, general provisions are still restricted to women and young persons. For these the weekly maximum has been reduced to 48 hours and the daily maximum to 9 hours. The daily period of employment has been reduced to 11 hours, and the continuous spell of work to $4\frac{1}{2}$ hours, unless the old period of 5 hours contains a ten minutes interval. In the case of young persons under 16 years of age there is to be a further general reduction of hours to 44 per week to operate after the expiration of one year from the commencement of the Act. A certain amount of overtime employment is allowed in the case of women and young persons over 16 years of age.

Amongst the new health provisions are the introduction of a definite standard of temperature (60°) for workrooms, insistence on sufficient lighting, and power given to the Home Secretary to place workers under medical supervision. For new workrooms 400 cubic feet space per worker is required, with a provision for raising old workrooms to the same standard in either 5 or 10 years from the commencement of the Act.

F. Tillyard.

Rules of the Supreme Court (No. 3), 1937

A detailed examination of these new rules would not be within the scope of this Journal, but they necessitate a brief reference in view of the importance of the changes which have been almost surreptitiously introduced. The so-called New Procedure which aroused so much public discussion when it was introduced in 1932 has now been abolished with the minimum of publicity. This does not mean that it had proved a failure. It had, on the contrary, admirably fulfilled its primary function of clearing

the ordinary lists of the congestion which had aroused so much criticism, especially from the business world, and it had proved so popular with lawyers that many cases were entered in the New Procedure List that were quite unsuitable for it (so that it was often possible to have a case heard more quickly in the ordinary lists) and towards the end its principal advantage was that it enabled a day to be fixed for the hearing. Following the recommendations of the Royal Commission on the Dispatch of Business at Common Law (Cmd. 5065 of 1936) the New Procedure List has been superseded by four lists—Special Jury, Common Jury, Long non-Jury, and Short non-Jury—and in these (or the Commercial or Short Cause Lists) must be entered all King's Bench actions directed to be tried in London. In order to enable it to be decided in which list the case is to be entered, the length of the trial has to be estimated—an excellent idea, but one which it may not always be easy to carry out effectively. Most of the advantages of the New Procedure rules are retained, a date may be fixed for trial, and important rules are introduced to facilitate proof of documents.

On the whole, the new rules are likely to meet with a favourable reception, but just exception has already been taken to the fact that rules containing such sweeping changes were not made available to the profession until a few days before the commencement of the term in which they were to come into operation. It should also be pointed out that although some of the recommendations of the Royal Commission of 1936 have now been introduced, their more drastic suggestions remain unsatisfied, and are likely to remain so for some years.

REPORTS OF COMMITTEES

Interdepartmental Committee on Sharepushing (Cmd. 5539)

In the report of the Chief Registrar of Friendly Societies for 1937 it was pointed out that the number of property societies so registered under the Industrial and Provident Societies Acts on 30th September, 1937, was approximately 100, of which about two-thirds were registered in 1936 and the first nine months of 1937. The share and loan capital subscribed by the public to these societies by the end of 1936 was £1,400,000, but mortgages and bank overdrafts totalled £2,000,000. Figures for 1937 are not yet available, but it is known that they show large increases. These figures in themselves speak of a legal problem of some magnitude, created by a gap in our existing Company Law, and it is satisfactory to learn from the statement of the Parliamentary Secretary to the Board of Trade in the House on 15th December last that the Bill which the Government have in contemplation will deal with property investment societies, as well as with commodity pools, and mushroom and similar farms. Both of the latter are recent developments which were commented upon in the Report of the Interdepartmental Committee under the chairmanship of Sir A. Bodkin, though they were not examined in detail, being regarded as strictly outside their terms of reference.

The Report as a whole, however, may be regarded as a remarkable manifestation of changing commercial morality, and it is significant that all sections of the House of Commons, in the debate on 16th December, fully approved its proposals. That some tenderness towards sharepushers has been shown in the recent past cannot be denied. The Report points out that of 177 firms which between 1910 and 1936 were known to the police as engaged in or suspected of sharepushing frauds, two-thirds were complained of between 1926 and 1936. From the 177 possible cases there were only 37 successful prosecutions, 5 of these being by the City Solicitor (whose functions in this respect ceased in 1926), 17 by the Director of Public Prosecutions, and 9 by private persons, the remainder being summarily dealt with. Since the publication of the Report, there has been a notable increase in prosecutions, many of them successful, and the sharepushers have now for the most part evacuated. It may be regretted, however, that sharepushers should so long have enjoyed so large a measure of immunity, and the proposals embodied in the Bodkin Report to prevent a recurrence of this in the future will receive general approval.

From the purely legal point of view, the Report contains several features of special interest. The exact analysis of the methods of the share-tout is in places almost as exciting as a novel. It is a characteristic of this type of activity that the tout so hypnotises his victim that the ordinary processes of logical deduction remain temporarily in abeyance. Apparently even acute business men in the City of London have not been entirely immune from their activities.

A second point of some importance in the Report is the sharp criticism which it contains of the ineffectiveness of those sections of the Act of 1929 which were intended (rather optimistically) to repress sharepushers. The precise meaning of some parts of section 356 have always been obscure, and it certainly did not go far enough. The Bill which is at present being drafted will presumably extend the existing law upon the lines suggested in Appendix IV of the Report.

Still another reform which is somewhat overdue is the proposal for the establishment of a Register of stock and share dealers. The report brings to light some remarkable evidence upon the rather casual way in which business may at present be transacted. In one case an ex-convict from Dartmoor set up as a broker in a northern town, with the result that might have been anticipated. Under the Finance Act, 1910, section 77, a register of stockbrokers is already kept, and the Committee found that under it a greengrocer and a mender of boots had obtained registration. It is to be hoped, therefore, that the new Bill will contain adequate provision for control of what is essentially an occupation requiring a fiduciary relationship between broker and client. It should be noticed in this connexion that the Report makes an interesting excursion into comparative law upon this point, from which it appears that most Continental countries have already found it necessary to establish stringent restrictions. The present writer is not greatly impressed by the alleged difficulties of control due to the miscellaneous nature of existing stockbroking undertakings. Because at the moment almost anyone can take up the business of share dealer, that seems to be no reason at all for a continuance of this unsatisfactory state of affairs. It is clear from the Report that in the recent past a good deal of money belonging to small investors has been fraudulently misappropriated, and for that the laxity of the present law is in no small degree responsible.

There is one further point, indirectly connected with the Report, to which the attention of the lawyer and of the general public should be turned. In the debate in the House of Commons on 15th December last, there was manifested a widespread desire that the whole question of the existing Company Law should be reconsidered. The Act of 1929, unfortunately, did not incorporate all the suggestions of the Wilfred Greene Committee, and it is notorious that recent developments and practice have made it yet more difficult for the ordinary shareholder to obtain a true picture of the real position of the company in which he is risking his savings. It is not overlooked that commercial competition may make some secrecy desirable, but it is submitted that the present law is too merciful on this point. The solution is probably to be found in a reconsideration of the functions of auditors; but whatever it is, it is disturbing to find that no general reconsideration of the Act of 1929 is apparently contemplated at present.

G. W. Keeton.

Interdepartmental Committee on the Rent Restrictions Acts (Cmd. 5621)

Under the existing legislation the Rent Restrictions Acts would come to an end on the 24th June, 1938, in England and Wales and on the 28th May, 1938, in Scotland. On the 27th May of last year the Minister of Health and the Secretary of State for Scotland appointed a committee "to inquire into and report upon the present working of the Rent Restrictions Acts and to advise what steps should be taken to continue or terminate or amend these Acts." On the 6th December this Committee delivered a Report signed by twelve of the fifteen members (of whom, however, two signed subject to an important reservation) and a Minority Report signed by the remaining three members. These Reports merit careful study by all interested in the problem of working-class housing.

The Majority Report after referring to the Reports of former Committees, first summarises the present position:

By the Act of 1933, controlled houses are divided into three classes by reference to their rateable value in 1931. Class A houses, whose rateable value was over £45 in London and Scotland and over £35 elsewhere, were decontrolled by that Act; Class B houses (London £20 to £45, Scotland £26 5s. to £45, and elsewhere £13 to £35) become decontrolled upon the Landlord obtaining possession; and Class C houses (being houses of less than the above values) can no longer be decontrolled, and any decontrolled prior to that Act had to be registered.

Part III of the Report deals with the general housing position and contains some interesting statistics comparing the present position with that at 1931 when the Marley Committee reported. Parts IV and V deal respectively with future housing developments and the extent of present house shortage based upon the over-crowding surveys made under the Housing Act, 1935, which show that in England and Wales 3·8 per cent and in Scotland 22·6 of the total of working-class dwellings were overcrowded, the geographical distribution being, however, very uneven. In Part VI, containing recommendations as to the future of control, the majority state that they act on the assumption that the amount of overcrowding in any area may be taken as a general indication of the amount of house-shortage in that area. This assumption is criticised in the Reservation by Alderman Sir Miles Mitchell, J.P., and Mr. Graham White, M.P., and in the Minority Report of Councillor Arthur W. Brady, Mr. Duncan, Mr. Graham, M.P., and Mr. F. Montague, M.P., who point out that "figures denoting a substantial decrease of official overcrowding can hide an equally substantial increase of bad housing," and who deny "that standards of housing are not the concern of the Committee . . . and that Rent Restriction is a matter not of quality but of quantity."

The recommendations of the majority on the subject of decontrol may be summarised as follows—

1. Class B houses of a rateable value exceeding £35 in London and Scotland and £20 elsewhere are to be decontrolled on the expiration of the present Acts, except in the case of houses which at the date of the Report contain two or more dwelling-houses (on these see paragraph 10).

2. As regards other controlled houses in England and Wales (but *not* Scotland) the majority consider that the time has come for varying degrees of control in different areas. Accordingly in 1940 the Minister of Health is to consider the general housing situation from the point of view of the natural aggregation of districts based on the degree of shortage and to issue Orders aggregating districts into various control areas. If the Minister is satisfied that the percentage of overcrowding in a given control area does not exceed 4 per cent, and that there are no special circumstances, the rateable value limits of control are to be reduced by £5. In 1942 the Minister is again to consider the position and to provide for the cessation of all control by specified reductions in the rateable value limits on specified dates. The result of this will be that all existing controlled C Class houses will remain controlled until 1942, after which they will gradually become decontrolled at varying rates in the different areas, the smallest houses remaining protected for the longest time.

This scheme of regional decontrol is subjected to a reasoned criticism in the Minority Report where it is pointed out that hardship may be caused to a tenant owing to the striking of an average over a large combined

area. Furthermore, the Minority deny that control is an evil which should come to an end some day, and take the view that control should be both general and permanent and should take the form of tenancy Courts "set up to deal with all cases of dispute, determination of reasonable rent, charges of nuisance, etc." In other words, the Majority and the Minority base themselves on two diametrically opposed social principles; that of the Majority is presumably the more likely to commend itself to a Conservative Government.

To the lawyer and the student of local government methods the Majority's scheme is interesting because it marks a reversal of the modern tendency to use for all purposes the ordinary local government divisions of the country. It will be observed that the Majority's scheme goes back to the earlier principle and recommends the creation of new divisions based solely on convenience for Rent Restriction purposes which will cut across the ordinary local government divisions whose authorities remain in charge of housing and who, indeed, have certain powers under the Rent Acts of which the Committee recommend that they should make greater use.

In addition to the major recommendation on the subject of decontrol, the Majority make further recommendations to most of which no exception is likely to be taken. These include casting the onus of proof of decontrol on the landlord (over-ruling *Heginbottom* v. *Watts*, [1936] 2 K.B. 6); extension of the time limit for recovery of over-payment of rent from 6 to 12 months (the Minority think that only the ordinary Statute of Limitations should apply); closing the registers of de-controlled C Class houses and providing for registration of the lower range of B Class houses which will become merged with Class C; over-ruling *Nickolson* v. *Jackson* (1921), 90 L.J. (K.B.) 1121, on the effect of compounding allowances; rendering compulsory the provision of rent-book giving full particulars of the landlord; and alteration of the form of sanitary certificates.

Further, like their predecessors, the Marley Committee, they recommend the consolidation of the Rent Acts. This is a reform which is long overdue, and it is scandalous that statutes designed for the protection of and vitally important to the working classes should be in such a confused state that far from being intelligible to those whom they are designed to protect, it is often impossible for them to obtain clear information and legal advice at a price which they are in a position to pay. It is also recommended that in any consolidating statute the wording of the present Acts should be retained so far as possible so that legal decisions on their interpretation may remain undisturbed. But why should the layman have to go to the Law Reports before he can understand the Statute? Surely it would be possible clearly to express the effect of the cases in the Statute? In any case, there seems no reason why an effort should not be made to clarify the wording of such parts of the Acts as have not yet been the subject of any authoritative decision; the present Acts are far from being triumphant examples of the draftman's art.

Finally, both the Majority and the Minority place on record their view that there should be a permanent restriction on the right to levy distress on working-class houses, but the Majority refrain from making any definite recommendation as they regard the question as beyond the scope of their terms of reference. It will be interesting to see whether any action is taken on this suggestion; the whole subject of distress is another branch of the law urgently in need of amendment and consolidation.

Since the above was written the Government have issued a White Paper (Cmd. 5667) explaining their policy. They believe that it is in the national interest that decontrol should be effected so soon as there is an adequate supply of houses. They propose to adopt the majority's proposal to decontrol immediately B Class houses within the limits mentioned above but they take the view that all considerations bearing on local housing should be taken into account before further control is effected and instead of adopting the proposals for regional decontrol they intend in due course to appoint yet another committee to inquire into the exact method and time. They accept the minor amendments recommended by the majority and intend to set up a special committee to consider the law of distress.

NOTES OF CASES

Contributory Negligence—Last Opportunity

The development of the law of Contributory Negligence is in many ways typical of the development of the Common Law. From a case decided on particular and somewhat unusual facts (*Davies* v. *Mann*) a general rule is derived which proves increasingly unsuitable for other cases and, in particular, for the changed conditions of an industrial age. Eventually, some Law Courts proceed to qualify and finally substantially to alter the old rule, while keeping up the appearance of continuity. Such judicial law-making in the face of precedent must needs be a slow and painful process. The situation of an ass tied on the highway, perhaps not frequent even in 1842, is like an idyllic dream of the past, in the England of 1938. But the rule of *Davies* v. *Mann* can only work with facts of a similar type, namely where the time interval between the two acts is clearly marked. That is not the case in the greater number of collisions between modern fast moving vehicles, on land even less than on the sea.

The chief stages in successive judicial attempts to adapt the rule in *Davies* v. *Mann* to modern conditions, appear to be the following—

1. *Loach's case*, [1916] A.C. 719, where the responsibility test was introduced into the test of the last opportunity, which, until then, had predominantly turned on causation. To miss the last opportunity had meant to give the decisive cause for the injury.

2. In *Admiralty Commissioners* v. *S.S. Volute*, [1922] A.C. 129, where a ship collision occurred during combined operations, the House of Lords decided that two acts, although not synchronous, may yet come so closely together and be so mixed up that it is not possible to decide who had the last opportunity, and the question resolves itself into an apportionment of blame. This decision marked a great progress in showing (1) that for many cases the causation test underlying "last opportunity" does not work, and (2) that in such cases the decision must turn on responsibility, not on causation, since the injury is caused by both parties. This applies, of course, not only to Admiralty cases, but Admiralty Courts alone can draw the logical conclusion and apportion damages in proportion to guilt.

3. The line indicated in the *Volute Case* was taken up by Lord Wright in *McLean* v. *Bell* (1932), 147 L.T. 262, a common law case where a girl was overrun by a tramcar, when the learned judge stated that "decision must turn on responsibility, not simply on causation."

4. *Swadling* v. *Cooper*, [1931] A.C. 1 exploded, to all intents and purposes, the doctrine of the last opportunity for collisions between fast-moving vehicles on land, but it did so, without open break with legal precedent, in the form of a direction to the jury. A motor car and a motor cycle collided at a junction; the time limit between the moment when the negligent car driver could have seen the negligent motor cyclist, and the collision was one second. The direction to the jury was: Who substantially caused the accident? In an Admiralty case, the result would probably have been an apportionment.

The decision of the Court of Appeal in *The Eurymedon*, [1938] 1 All E.R. 122, an Admiralty case, is a further important contribution to the development of the law. There was a collision in the Thames between the plaintiff's steamship *Eurymedon* and the defendant's steamship *Corstar*. It was found by Bucknill, J., that both vessels were to blame, the *Corstar* in that

she was improperly anchored athwart fairway, and the *Eurymedon* in that she had kept an insufficient lookout, and could have avoided the collision had she been properly navigated. The Court held that there was continuing negligence on the part of both vessels, which had lasted right up to the time of the collision. In these circumstances it could not be said that either vessel had the last opportunity of avoiding the collision, and both vessels were equally to blame.

Greer, L.J., attempted to summarise the law arising out of the rule in *Davies* v. *Mann*, in five propositions, of which, while the first three are familiar and need not be repeated, the fifth was avowedly new, but derived from rule 4 as a necessary corollary.

> Rule 4 says: If the negligence of both parties continues right up to the moment of collision, on land or sea, each party is to blame for the collision and for the damage resulting from the continuing negligence of both.
>
> Rule 5 says: If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

Greer, L.J., thought that rule 5 was implicitly involved in *Dowell* v. *Gen. Steam Navigation Co.*, 5 E. & B. 195, approved in *Loach's case* and in the *Volute case*. Scott, L.J., gave a judgment equally important for the law of contributory negligence and for the principles of judicial interpretation. He first expressed qualified approval of the new rule formulated by Greer, L.J., which as a general rule, Scott, L.J., said, would need some elaboration and qualification. His own view was that the question of contributory negligence had ultimately to be decided on the facts, and that the tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense was to be deprecated. A solution sought only "in terms of causation" would make it difficult to avoid the conclusion that the last link in the chain was also the determining factor in the result. "But legal responsibility does not necessarily depend on the last link." This line of thought follows the *Volute case*, *McLean* v. *Bell*, and *Swadling* v. *Cooper* (Scott, L.J., did not mention the last of these cases).

It now seems necessary to investigate a little further the meaning of the statement endorsed by such eminent authorities as Lord Birkenhead, Lord Wright, and Lord Justice Scott that the decision in cases of contributory negligence must turn on responsibility rather than on causation. Leading textbooks (Salmond, sect. 126; Winfield, sect. 127) have found it impossible to explain the law of contributory negligence completely either in terms of causation or in terms of negligence, i.e. responsibility.

The implication of the decisions from the *Volute* to the *Eurymedon* seems to be that, although responsibility can never be attached to a person who has not contributed to the causation of the accident, the causation theories alone do not give sufficient guidance. The test of the ultimate cause is apparently rejected, and the test of the decisive cause is considered as inadequate (*a*) in cases where there is no substantial time interval between the acts of the parties and (*b*) in cases of continuing negligence. The negligent steering of one ship may have started earlier than the negligent anchoring of the other but this is quite different from one act causing the other. The legal problem for the cases of group (*a*) is therefore substantially the same as for those of group (*b*). The *Eurymedon*

belongs to group (*a*), *Swadling* v. *Cooper* to group (*b*). In group (*b*) causation theories cannot solve the problem, because both acts jointly and simultaneously cause the injury. The decision must therefore turn on responsibility, as in the *Volute* and in *Swadling* v. *Cooper* (where "substantially cause" meant, in effect, "substantially responsible"). But in group (*a*) one party establishes a cause, e.g. by having a defective steering gear, or by keeping an insufficient lookout. This cause continues to be effective right up to the moment of the collision. Independently of such behaviour, another person establishes another cause, e.g. by anchoring a ship athwart the fairway. But neither of these acts, both negligent, causes the other. They start independently of each other, probably at different moments, and, by meeting each other, produce the damage. Either party has an opportunity of altering its behaviour and thereby eliminating the cause, but neither avails itself of the opportunity, i.e. the negligence of both continues right up to the collision. For that reason, it is respectfully submitted, Greer, L.J.'s, rule 5 is not only unnecessary, but actually misleading. Rule 4 deals adequately with all these cases. Either both acts are entirely or practically simultaneous, as in most collisions between motor vehicles, or both acts start at different moments, but continue up to the moment of the accident. In every case, joint responsibility can be the only adequate result, and the only theoretical difference seems to be, that in the latter group of cases, the act of one party, is, in the eyes of the other, a "novus actus interveniens." It interrupts, technically, the causation, but the "rough policy of the law" (Salmond, sect. 126) rightly decides that this physical interruption should not extinguish liability, leaving the decision to a weighing of responsibilities. It may be interesting to note that a very similar problem arose in German law, where Art. 254 of the Burgerliches Gesetzbuch provides that damages should be apportioned according to which of the parties has more substantially caused the damage. It is generally agreed that the term "causation" instead of "responsibility" was chosen merely to include cases of strict liability, and that, generally speaking, the decision must turn on responsibility, not on causation. This is very similar to the recent developments in English Law. It reinforces the point made above that "substantially cause" (*Swadling* v. *Cooper*) means really "be substantially responsible."

To sum up, it is the elimination of the time interval in most modern accidents, especially those between fast moving vehicles, which has prevented causation theories from solving the problem of contributory negligence. It is therefore to be welcomed that the House of Lords as well as the Court of Appeal seem determined to abandon causation controversies in this matter and to weigh responsibilities. But so long as Common Law Courts are compelled to lay the blame entirely upon the one or the other party, instead of apportioning it, as would be the proper solution in most cases, the law is bound to remain unsatisfactory. The contradictory evidence of parties and witnesses in most collision cases makes it particularly difficult to hold one of the two parties entirely responsible, therefore the common law rule must lead to a certain arbitrariness in the weighing of evidence and will leave a feeling of grievance in the party held fully responsible.

Scott, L.J., made some important observations on statutory interpretation. He said that a wide view of joint responsibility, in accordance with the spirit of the proportionate rule of Admiralty Law, had the

advantage of being consonant with the practice of other parties to the Collision Convention (legalised in England by the Act of 1911).

"The maintenance of uniformity in the interpretation of a rule after its international adoption is just as important as the initial removal of divergences. That we should, in a branch of law covered by an international convention, preserve uniformity, is an obvious advantage, if it is judicially possible." Cf. on similar lines, Greene, L.J., as he then was, in *Grein* v. *Imperial Airways, Ltd.*, [1934] 1 K.B. 50 *et seq.*

Here comparative law is brought in to support a teleological interpretation (uniformity of maritime law) and both reinforce a result consonant with logical analysis. But as the whole controversy over contributory negligence shows, logical analysis alone leaves several possible conclusions. The ultimate decision must turn on a weighing of social values, and it is to be welcomed that a distinguished judge should do so openly.

W. Friedmann.

Contract for Sale of Land—Penalty

In *Mussen* v. *Van Diemen's Land Co.*, [1938] 1 All E.R. 210, an important qualification has been added to the rule that where in a contract for the sale of land the purchase price is to be paid by instalments a clause providing for forfeiture of instalments already paid on default in payment of a further instalment is in the nature of a penalty. Farwell, J., decided that in such a case the purchaser is only entitled to repayment of the amount forfeited by way of equitable relief if at the same time he is asking for, or is in a position to ask for, specific performance of the contract. In such circumstances the unconscionable conduct, which is the prerequisite for the intervention of Equity, is to be found, in the opinion of the learned judge, in the refusal of the vendor to credit the purchaser on performance of the contract with the forfeited instalments.

In view of dicta such as that of Mellish, L.J., in *Re Dagenham (Thames) Dock Co.* (1873), 8 Ch. App. 1022 at p. 1025, "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty," one might have thought that the mere presence of such a provision constituted a prima facie case for equitable intervention, leaving it to the vendor to justify the retention of the instalments received by proof of damage suffered as a result of the purchaser's breach of contract.

In *Steedman* v. *Drinkle*, [1916] 1 A.C. 275, the plaintiff claimed specific performance and alternatively relief from forfeiture. The Privy Council granted such relief but refused to decree specific performance. This decision was explained by Farwell, J., on the ground that in granting relief the Board must be taken to have considered that the plaintiff had asked, however unsuccessfully, for specific performance. There is, however, nothing in the judgment of Viscount Haldane to indicate that the alternative claims of the plaintiff were considered in relation to each other; and even if this had been done, it is submitted with great respect, that it seems at least equally possible to say that equitable relief was granted to the plaintiff although he had not been granted specific performance as because he had also asked for specific performance.

On the latter reading of the case the distinction drawn comes perilously

near that between a purchaser who, knowing that he is not entitled to ask for specific performance, refrains, as an honest litigant, from making such a claim, and a purchaser who in spite of such knowledge maintains a claim for specific performance.

The passages in the judgment which stress the fact that the plaintiff entered into the contract with his eyes open and that, as an experienced business man, he must have contemplated the possibility of finding himself in financial difficulties show that the present tendency of the Courts which is strongly inclined against interference with contractual freedom is also making itself felt in the exclusive realm of Equity. This tendency, evidenced by decisions such as *Kirk* v. *Eustace, supra*, p. 157, or, quite recently, *Port* v. *Griffiths*, [1938] 1 All E.R. 295, is of interest as reflecting present conditions of economic prosperity.

J. UNGER.

Road Traffic Acts—Compulsory Insurance

What must be regarded as one of the major defects in the provisions of the Road Traffic Act, 1930, relating to compulsory third party insurance was the loophole left open for the avoidance by the insurers of the policies taken out thereunder (see "The Position of the Injured Third Party," *above*). This was partially remedied by the amending Act of 1934. Another weakness in the same part of the statute, again apparently due to legislative tenderness for the insurance companies has been revealed by two recent cases *Izzard* v. *Universal Insurance Co.*, [1937] A.C. 773, and *Wyatt* v. *Guildhall Insurance Co. Ltd.*, [1937] 1 K.B. 653.

Section 36 (1) deals with the scope of the policy required, and exempts from compulsory cover the following three cases—

(*a*) liability in respect of death or injury to a workman arising out of or in the course of his employment;

(*b*) passengers, except in the case of a vehicle used to carry them for hire or reward or by reason of or in pursuance of a contract of employment;

(*c*) any contractual liability.

The first of these exemptions is open to serious objection in that an accident covered by the Workmen's Compensation Act, as is obviously intended, not infrequently gives rise to a claim in tort, and it is a little difficult to see why an employer should be under a lesser obligation to safeguard the workman on whose services his business depends than the casual citizen whom he may injure. It may be possible, however, to give a narrower construction to the words and to confine the exception to cases where the Workmen's Compensation Act applies, though this appears to deprive it of any real meaning.

The second exemption is even more objectionable. The chances of a passenger being injured by negligent driving are quite considerable, and to exclude him from the privileges of the Act is to revive indirectly the doctrine of identification exploded in the *Bernina* (13 App. Cas. 1). Policies have in actual fact usually provided cover in these cases, but the provisions of this subsection are a direct encouragement to the insurance companies to cut down the extent of the cover. Moreover, in spite of the section, even a person who pays for his transport may find himself unprotected. This is well shown by *Wyatt's Case* (*supra*). The normal policy issued for "social

domestic and pleasure purposes" does not cover the driver, if he carries a paying passenger, even if it be such a nominal sum as would simply furnish a contribution towards running expenses. Quite apart from this the words "in the case of a vehicle in which passengers are carried" were construed to mean "are habitually carried for reward in that vehicle," so that it could hardly be contended that the driver who only had a "social and domestic" policy was committing an offence by not insuring a casual paying passenger. In *Wyatt's Case* the plaintiff had been invited to accompany the defendant as a paying passenger.

In *Izzard's Case* the Court of Appeal, [1936] 2 K.B. 555, had to consider the other qualification on the exemption, "carriage by reason of a contract of employment," and succeeded in putting such a narrow construction upon it as to deprive a widow of compensation. Izzard was a workman who was being carried home from his work under the terms of his employment, when he was fatally injured in a road accident. His employers did not own the vehicle in question, but had made an arrangement with its owner for the transport of their work people. The Court of Appeal took the view that since the deceased was not employed by the owner of the vehicle, he was not within the qualification to the exemption, and must be treated as a mere voluntary passenger. The House of Lords has dissented from this view ([1937] A.C. 773) and adopted the wider interpretation that all cases of carriage resulting from contracts of employment are intended to be covered. After all the object of the legislature was to give protection to the third party, and it is submitted that the Courts ought to construe the Act as a charter of indemnification to such persons.

Again, exemption from obligation to insure contractual liability appears to be a serious weak point in the Act. There have so far been no decisions as to the precise scope of the matter. It is bound to be argued sooner or later, that since the liability of a carrier to his passengers is a contractual liability, he is not bound to insure them. In other words there is a contradiction between this subsection and the reservation in the previous subsection relating to passengers carried for hire or reward which we have just discussed. If the Court acts on the principle of construction suggested above, this difficulty can be got over by suing in tort instead of contract. What other contractual liability "for death or bodily injury caused by or arising out of the use of the vehicle" is likely to arise? The carrier is unlikely to assume any higher responsibility than that placed upon him by the law of tort. He may, however, cut down his obligations by special contract, though this is not allowed in the case of public service vehicles (see s. 97). Such a cutting down might result in some remaining liability, and it is the obligation to insure this, of which the draftsman was presumably anxious to relieve him. Why he should have desired to show such solicitude in a case which seems to be quite undeserving of it, is not apparent.

R. S. T. Chorley.

REVIEWS

LAW AND OTHER THINGS. By The Rt. Hon. Lord Macmillan, G.C.V.O., LL.D. Cambridge: at the University Press, 1937. 284 pp. **8s. 6d.** net.

After Lord Macmillan had spoken at a recent international congress one of the foreign delegates remarked to the present reviewer, "On voit tout de suite que c'est une grande personnalité." It is a judgment from which there can be no dissent. We all know of Lord Macmillan's distinguished career in law and in public life, of his great intellectual gifts, his immense capacity for work, and the unsparing way in which he has given his talents to the service of the State and to the promotion of bodies and causes which work for the public good. But others might do as much without achieving the same commanding influence or winning the peculiar esteem and affection with which Lord Macmillan is regarded by all who have met him or heard him speak. The secret lies in the personality which reveals itself in the pages of the volume before us.

The distinguished author has here collected addresses on such subjects as "Law and Politics," "Law and Ethics," "Law and Religion," "Law and History," "Law and Language," which he has delivered to audiences of lawyers and others. With one exception—a paper on "The Ethics of Advocacy," which was read before the Royal Philosophical Society of Glasgow in 1916—they date from the last ten years. There are also included three papers on the judicial and literary work of Lord Chancellor Birkenhead, two of which were originally published as reviews in *The Empire Review*, the third being the brief but eloquent valediction which appeared as a preface to Lord Birkenhead's *Last Essays*.

The addresses would repay study as models of the speaker's art. Lord Macmillan does not preach, he talks. He talks with a felicity of word and phrase so perfect as to seem unstudied; he talks with such appearance of spontaneous and discursive ease that one only gradually realises that beneath the smooth surface there is moving a strong and persuasive current of thought. *Ille regit dictis animos, et pectora mulcet.* Or we may say with the older poet, *Suadaeque medulla.* What he says and the manner in which he says it are always perfectly suited to the occasion. To Scottish law agents celebrating the jubilee of a professional association he speaks as a fellow-practitioner in reminiscent and reflective mood, to students as a wise and kindly elder, to members of historical and philosophical societies as one who from his technical experience can bring some contribution to the discussion of problems which concern lawyer and non-lawyer alike. When he turns to address a nation-wide audience (in his broadcast National Lecture on "Law and the Citizen") he assumes, though not so completely as altogether to disguise the man, the robe of the judge and statesman, and his natural *urbanitas* and *comitas* are reinforced by the deeper notes of *gravitas* and *auctoritas*.

If this versatility were merely the product of conscious rhetorical artifice we might admire it, but it would leave us cold. But, just as the numerous apt quotations which illustrate his argument—he is as much at home in his classics from Heraclitus to Petronius as he is in English literature, and his legal reading extends from early anonymous Scottish treatises to the productions of contemporary academic jurisprudence which the busy professional lawyer so seldom has time to read—are no

artificial pendants but arise naturally out of a well-read and cultured mind, so the characteristics of his style are but the index of a spirit naturally able to enter into sympathetic relation with diverse audiences because of its breadth and warmth of human feeling. This broad and warm humanity makes him always conscious of law as something more than an abstract scheme of self-sufficient rules. To him law is the great force which by preserving order makes for liberty in human affairs. "Law is something much greater and nobler than the contents of any statute-book, of any code, of any volume of judicial decisions. It is the guardian and vindicator of the two most precious things in the world—justice and liberty." The same spirit colours all his discussion of the relations between the categories of thought which man has devised to give him guidance in his progress through life—law, government, ethics, religion. He does not, in view of the nature and occasion of his addresses, profess to treat with formal academic completeness the questions which he raises, but he explores them so far as is possible in the circumstances and always with humanity, culture, enthusiasm, intellectual freshness, and a sense of the deeper problems lying below. These qualities give life and value to everything he says. No one, lawyer or layman, can read this book without finding in it something to enrich his knowledge and stimulate his reflection.

A. H. CAMPBELL.

A CENTURY OF LEGAL PROGRESS. Edited by ALISON REPPY. New York University Press. Three Volumes. $25 the set.

The first point which strikes the reviewer in perusing these three packed volumes, published by the University of New York to celebrate the hundredth anniversary of the foundation of its Law School, is the extraordinary vigour of the legal profession in America. Its achievements in the century have been no less notable than those of its industrialists and its statesmen. It has extended the Common Law over a continent, it has achieved high professional standards, it has built up law schools and law libraries unequalled throughout the world, it has produced jurists of the highest rank; in fact, one might prolong the catalogue considerably, and still not exhaust the list of its achievements. No wonder, therefore, that in the United States, law is a living force, constantly diverted to new ends. The century has been a memorable one for law, and the signs are that the next century will be at least as notable as the last, for if the present reviewer has read aright the evidence presented by these three volumes, the American lawyer is looking forward, eagerly, a little apprehensively, perhaps, but with an unsated appetite for social experiment. There is, of course, no unanimity either over ends or means. Some writers set the seal of their approval (a trifle nervously, maybe) upon the recent activities of the Supreme Court. On the other hand, Professor Corwin has delivered a shattering assault upon it in the matter of the *Schechter Case*. Again, Professor Laski, in his most downright mood, argues that the capitalist state, having failed to solve the fundamental problem of the subsistence level of the masses, must necessarily drift into fascism, and so at last be destroyed by a militant communism; whilst Professor Kantorowicz stoutly defends the liberal capitalist state and ends with a memorable paragraph—

"I am fully aware," he says, "that no considerations of any kind can save individualistic capitalism. I am convinced that the future belongs

to State capitalism with a tendency towards socialism—to national, not to international, socialism. Socialist propaganda has made capitalism a spiteful byword which even the capitalists begin to be ashamed of using. Capitalism has been sentenced by history and public opinion, but the witnesses have been false, the advocates weak, the jury biased, and the verdict they returned was untrue."

Fortunately, history is never written; it is always being written, and it may be that the pessimism of Professor Laski and that of Professor Kantorowicz are alike premature. Capitalism still rears an unrepentant head in the United States, and there are few signs either of fascism or of militant communism as yet in this country. Possibly the reasons for this are economic, but if that is so, it should prompt a further investigation into the working of liberal democracies, since they appear to be able to weather economic storms better than dictatorships of either the right or the left.

Of the various sections into which this work is divided, the present reviewer found the section upon Jurisprudence the most stimulating, and that upon International Law the least. Professor Kocoureck, in an excellently-balanced contribution, sums up the progress which has been made in analytical jurisprudence, since Austin, paying the well-merited tribute to Holland and to the neglected Terry, whilst Professor Morris Cohen discusses the aims of the realists and the functionalists, after emphasising the vagueness of the constructive side of Pound's "social engineering." This, of course, has been noticed before, and it is a little surprising that among all the varied shades of juristic thought in the United States there are to-day apparently no naturalists.

The International Law writers are, frankly, disappointing, leaving the reader with a feeling of frustration. Professor Borchard's bleak negativism leads him no further than to a lament for the good old days of nineteenth century stability, and an advocacy of a return to "neutrality." For him International Law is a system of fixed content, with the result that almost the whole of the policy of the Allies at sea after 1915 (and *Semble*, of the U.S.A., after 1917) was "illegal." To the European, such a point of view seems as remote from actualities as the conception of an inviolable neutrality in a world which has shrunk to such a point that even the west coast of the United States cannot now be regarded as secure from hostile attack. The recent sinking of the *Panay* merely adds point to this criticism of a purely negativist attitude.

One final impression must be noted. The cumulative effect of these essays affords a tribute to the intellectual activity of the law schools, where acute academic lawyers are constantly testing principles, criticising policies, and stating conclusions even if only tentative. No wonder they have won such a commanding position in their profession, and there is much in their methods that we over here would do well to ponder.

G. W. Keeton.

PUBLIC ENTERPRISE. Edited for the New Fabian Research Bureau by William A. Robson. George Allen & Unwin, Ltd. 416 pp. **12s. 6d.**

The 1937 crop of books in the field of political science has been exceptionally interesting; the one now reviewed is perhaps the most interesting of them all for the student of administrative law. It deals with at least one

species of the curious and bewildering genus of "semi-independent" administrative authorities that immediately sprang into prominence (multiplying especially in the last ten years or so in ever-increasing numbers) following on the solemn excommunication of such things by the Machinery of Government Committee of 1918. The purpose of the book is, of course, to provide a general, all-round description of the boards and commissions which are entrusted "with the operation of vital public utilities and the regulation or organisation of great national industries," a task which it adroitly accomplishes. Though it is not written primarily from the point of view of the legal expert, it is easy to see that something of the kind is implied in the work, and this is no doubt because it has one for its editor.

> "Since the political control which is exercisable over the public service boards is comparatively weak" (writes Dr. Robson), "it is desirable that judicial control over their activities should be strengthened, and be made, indeed, much stronger than it is in the case of an ordinary government department subject to full ministerial responsibility to Parliament. . . . The need for a system of administrative courts has grown apace with the emergence of each of the public boards described in these pages."

The muddle that the creation of "semi-independent" administrative authorities has caused for the constitutional lawyer has been laid bare by Dr. Ivor Jennings, in his series of "Notes on Administrative Law," in the Journal of Public Administration. The muddle for the administrative lawyer is, however, not quite as great. The poverty of basic doctrine is equally regrettable from both points of view (though, as Dr. Jennings would say, it is, perhaps, a little hypercritical to expect a major adjustment of the body of English law in the brief space—some 100 years—since the new authorities first appeared on the scene). But certain superficial adjustments, admittedly slight, have in this case been made in legal methods, if not in principle. The adjustments, such as they are, are significant, for they point the way to the path of future progress; if progress is to take place.

The problem that has been set the lawyer is this: can a satisfactory substitute be found for the old, abandoned, controls over the economic enterprises concerned, which will guide them to the position where they will be of greatest value to the community, providing socially necessary services at a fair price? Competition has failed in nearly every respect; political control has been relaxed, almost completely, in the interests of technical efficiency. We are left with two final possibilities: administrative and judicial control.

A great deal can be done by the first method, particularly if the suggestions put forward by the various authors of the present work are adopted. But there remain certain broad issues that cannot be tackled administratively. "The public," it is said (p. 175), "has to be protected from excessive charges, the staff from exploitation, and the authorities with whom the L.P.T.B. come into contact from unfair treatment." What, it may be asked, is the fair price for milk? For fares on London buses? What is a fair remuneration for the farmer? For the bus driver? To what compensation are the dispossessed owners of economic enterprises entitled? What should be the rate of interest payable to the holders of their stock? The answers are not easily found.

Accordingly, we see that the Railway Rates Tribunal has been made

the arbiter of London Transport fares, whilst the assessment of the compensation paid to the owners of the old 60 undertakings was made by the London Passenger Transport Arbitration Tribunal, and so on. But the consumers of milk are utterly unprotected, and, as for the methods of "settling" salaries and wages, the less said the better, particularly since the Coronation Bus Strike.

Dr. Robson is right. We need new administrative courts, and a new administrative jurisprudence. The machinery of the Railway Rates Tribunal is sound, though it needs overhauling and expansion; the Civil Service Arbitration Tribunal has an excellent record of work behind it. The time is ripe for developments all along the line, and it should not be difficult to piece together a secure foundation for an advance into new territory out of the material that lies ready to our hands.

T. S. Simy.

MAXWELL'S INTERPRETATION OF STATUTES. Eighth Edition. By Sir Gilbert H. B. Jackson, late Puisne Judge of the High Court at Madras. London: Sweet & Maxwell, 1937. cxii and 381 pp. **£1 12s.**

The Courts spend much more time in the interpretation of statutes than in the development of the common law, in spite of the average student's belief that the law *is* the common law. Moreover, administrators, legal advisers to companies, and the like, spend much of their time trying to find out what Parliament intended or, what is not by any means the same thing, what the Courts are likely to say that it intended. In fact, the two fundamental problems of the modern law are, in the first place, legislation, and in the second place, the interpretation of legislation, though neither problem is properly treated of in our books or taught in our law schools. A good book on statutory interpretation is therefore essential. Such a book may take one of two forms: either it may indicate how judges interpret, or it may set out how judges say that they interpret. Maxwell and Craies both adopt the latter alternative; and as judges have developed contradictory principles, the result is confusion. There is, for instance, hardly a rule in Maxwell which cannot be matched by its opposite, also in Maxwell. The editor of the present edition thinks that it should be read and not used as a work of reference. An intelligent man does not read it, but he does use it as a work of reference to find out the principle that suits his client. If he wants a liberal interpretation he looks up the developments of *Heydon's Case*; if he is anxious for a strict interpretation he discovers that a presumption has been invented to suit him. (See, for instance, *Consett Iron Co.* v. *Clavering*, [1935] 2 K.B. 42, where Slesser, L.J., found that a presumption enabled him to protect property, while the "purpose" of the Act enabled Greer, L.J., to interfere with it, while Roche, L.J., was able to use the long and short titles to come down on the side of property.)

The editor has not interfered much with the text. He has added an occasional sentence and referred to most of the recent cases. Others he left out, possibly, because the method of interpretation often lies secreted in the substance. For a local government lawyer, for instance, practically every local government case is an application of one or other of the rules of interpretation, and he is able to see which rule is (or what contradictory rules are) applied. The following list gives a few cases which might have been mentioned, together with a few minor criticisms—

Re Hector Whaling, [1936] 1 Ch. 208, would be better placed on p. 301

than on p. 300. The fact that one Act may incorporate future Acts merely by stating that it incorporates certain kinds of Acts might have been mentioned: *Ellen Street Estates* v. *Minister of Health*, [1934] 1 K.B. 590. For *Lewis* v. *Bearey*, on p. 147, read *Re Berrey, Lewis* v. *Berrey*. *Altrincham Electric Supply* v. *Sale U.D.C.* (1936), 34 L.G.R. 215, a House of Lords decision, might have been referred to, since it contains many statements on principles of interpretation. On absurdity, see *Central London Rly.* v. *Inland Revenue Commissioners*, [1937] A.C. 77. On private Acts, see *Barton* v. *Moorhouse*, [1935] A.C. 300. *Swan* v. *Pure Ice Co.*, [1935] 2 K.B. 365, deals with several questions of interpretation, besides that of consolidation, for which it is quoted. The reference to *Assam Rlys.* v. *Inland Revenue Commissioners*, [1935] A.C. 445, on p. 26 appears to me to be inaccurate, especially when that case is read with the *Eastman Kodak Case*. I think that *Astor* v. *Berry*, [1935] A.C. 398, ought to have been referred to. On a course of legislation, see Goddard, J., in *Allen* v. *Waters*, [1935] 1 K.B. 200. On the presumption in favour of freedom of contract, see *David* v. *De Silva*, [1934] A.C. 106. On consolidation Acts, see also *Notts C.C.* v. *Middlesex C.C.*, [1936] 1 K.B. 141; *Re Turner's Will Trusts*, [1937] 1 Ch. 15. On the presumption against interference with property rights, see *Re Bowman*, [1932] 2 K.B. 621; *Turton* v. *Turnbull*, [1934] 2 K.B. 197; *West Ham Corporation* v. *Benabo*, [1934] 2 K.B. 253; *Consett Iron Co.* v. *Clavering*, [1935] 2 K.B. 42; *Druce* v. *Beaumont Property Trust*, [1935] 2 K.B. 257. On strict construction of taxing Acts, see *Dewar* v *Inland Revenue Commissioners*, [1935] 2 K.B. 351. On the presumption against retroactive effect, see *Re Nautilus Steam Co.*, [1936] 1 Ch. 17. On the presumption against deprivation of the right of access to the courts, see *R. & W. Paul* v. *Wheat Commissioners*, [1937] A.C. 139.

W. Ivor Jennings.

CHITTY ON CONTRACTS. Nineteenth Edition, under the general editorship of Dr. Harold Potter. Pp. ccxvi and 1031. London: Sweet & Maxwell, Ltd., 1937. **50s.** net.

This book is, in its way, like the Common Law. It grows and develops from century to century; a good deal of it is very much out of date, but the balance its users evidently find to their mind. It has its good and its bad points—which of them predominate it is not very easy to say. That a volume written (in 1826) before the really scientific study of the law of contract had begun in England should still be going strong is on the face of it such an extraordinary thing as to call for investigation. Yet it is by no means a unique phenomenon, for a large proportion of our leading textbooks share its venerable antiquity, and most of them with equal lack of scientific justification. The reason must be found in the conservatism of the legal profession, for if the demand for these works was not substantial the vested interests of the publishers could not keep them on the market. It is evident that they fill a useful purpose. One element is perhaps their portly size—a row of Chittys on the bookshelves of a solicitor's office must be persuasive to the lay client of great learning. More important is the extraordinary variety of material and almost terrific citation of decisions—a practitioner who knows his way about this volume must be always striking against little nuggets of metal which at any rate have the appearance of gold. But will a new generation of lawyers trained in a more scientific school maintain this curious penchant for the antique?

However, we must say something about the nineteenth edition. Chitty

judged by the standards of 1820 was no doubt a good book. Judged by comparison with Pollock, Anson, and Salmond and Winfield, it is far from good. Dr. Potter has enlisted a very strong team of editors in his endeavour to bring about a radical transformation. Transformed it they have, but it is still not a good book. The new wine ferments in the old bottles, but the result is hardly intoxicating. One of the greatest difficulties, perhaps the fundamental one, is the lack of a satisfactory analytical arrangement. Dr. Potter's preface shows clearly that he realises this, and he has done as much as a brave editor dare to remedy it, but as he says, "practitioners have been accustomed to this work in its present form for a very long time." In these circumstances we would suggest that much greater use should be made of cross-references. A number of important instances leap to the eye. In the short and inadequate section on hire purchase, contained in the chapter on "Sale of Goods," no reference is made to the much fuller treatment of the same subject in the chapter on bailments. Stoppage in transit is independently dealt with, both under "Sale" and "Carriage of Goods." Agency is dealt with under two widely separated headings, without cross-references. Part performance, a doctrine brought into being by the Statute of Frauds, is not mentioned under that subject, but is well discussed by Dr. Potter himself under "Specific Performance." Section 40 of the Law of Property Act, 1925, receives separate treatment some three hundred pages after section 4 of the Statute of Frauds. A syndicate of editors is almost bound to produce instances of this sort of thing, and it may not greatly matter from a practical point of view if cross-referencing is attended to.

On Sir Charles Odgers the greatest burden has fallen, that of having to modernise the chapters on the general principles of contract. He has our sympathy. He has made use of the recent decisions with much skill, but his mahogany does not dovetail into the old oak. Lack of space prevents us from going into detail about this, but a good illustration would be the subject of mistake. *Bell* v. *Lever Bros.*, [1932] A.C. 161, is perhaps a good example of cubist painting, but it is not well hung in the gallery among a poorish collection of Victorians and others.

There are some very serious omissions in some of the other chapters. No reader would dream that almost all overseas commerce is carried on on the basis of c.i.f. contracts—unless we are mistaken there are only two lines about them in the whole volume. Again, the finance of overseas commerce is based on bankers' credits. Mr. R. W. Jones, in a very competent, if rather too compressed, section on the law of banking (eight pages) maintains a silence on the subject which no one is better qualified to break than he. In the chapter on "Carriage" we miss any treatment of that crucial topic; deviation—failure to mention general average is more excusable, but why write on carriage by sea if there is no space for such topics? And why should we not have a chapter on insurance? There is, of course, a mass of valuable material in the book—there always has been. The reviewer would be sorry if his strictures too much obscured this fact. Moreover, the present re-editing certainly makes this material more available and more palatable than of old.

In conclusion we think it would be a really valuable piece of work to conduct an inquiry into the reasons which lead practitioners to purchase the particular textbooks which they affect. If it should happen that these lines should catch the eyes of some among them, may we encourage them to write to the editor about the subject? The scientific standard reached

by the textbooks in everyday use is some measure of that attained by the profession as a whole. To obtain more light on this subject would be a research of great value. R. S. T. CHORLEY.

THE ENGLISH LEGAL SYSTEM. By G. R. Y. RADCLIFFE, D.C.L., and GEOFFREY CROSS, M.A., London. Butterworth & Co. (Publishers) Ltd. 8vo., pp. viii and 428. **16s.**

This is, as the Preface tells us, a book intended for students beginning the study of the law. It is partly historical, in that it sketches, in the first sixteen chapters, the appearance and growth of English judicial institutions; and it is partly analytical, in that it devotes three chapters to a description of the existing tribunals. The three final chapters deal respectively with Case Law and Statute Law, the Legal Profession, and the Legal System and the State. The authors expressly disclaim original research, though it is obvious that they have not been able to resist its charms. It is natural to compare *The English Legal System* with the recently published work of the distinguished Professor of Comparative Law in the University of Paris. M. Henri Levy-Ullmann, entitled, in the admirable translation by Dr. Goadby, *The English Legal Tradition.*[1] Both are masterpieces; and the work under review is worthy to rank with its brilliant predecessor.

The chief difficulty of the authors has, obviously, been to describe the framework of English substantive law without attempting to describe the law itself; and all English lawyers will appreciate the magnitude of that task. How, for instance, can one expect a reader to understand the working of the "assizes" and other "real" actions without some knowledge of the system of land law which these forms of actions pre-supposed, or to appreciate the importance of the "case" actions without a study of the highly technical doctrine of "consideration" which evolved from the specialised action of Assumpsit? The learned authors would, we feel sure, be the first to admit that it is impossible, in a work of this nature, completely to overcome this difficulty; but it is only right that the reviewer should state that, in his judgment, the skill which they have shown in handling it is of a remarkably high order. One effect, very important, which they have produced is, to convince the reader of their pages that they, at least, know the whole story, even if they restrict themselves to telling only a part of it.

If the reviewer were to distinguish chapters of outstanding merit, he would select No. XIV, which contains a thoroughly sound account, most useful for a modern lawyer, of the Courts Merchant and Maritime, and the final chapter (No. XXII) on the Legal System and the State, in which good use has been made of the admirable little study by Mr. R. C. K. Ensor,[2] by way of contrast, of the relationship to the State of a typical Continental legal system.

Of small points for criticism it might be suggested that, in emphasising the subjection of the copyholders to their lords "until the end of the Middle Ages," exception should have been made for the powerful protection of the criminal jurisdiction of the King's Courts (p. 23). The classical, but wholly untrue doctrine that, "land was by far the most important article of property in the Middle Ages" (p. 36) ought at last to be allowed to die of old age. Surely it cannot be right to suggest (p. 66) that the appellee in *Ashton* v.

[1] With a Preface by Sir William Holdsworth, Macmillan, 1935.
[2] *Courts and Judges in England and France*, Oxford, 1933.

Thornton could (after being acquitted) have had to "face a second trial by jury." An unlearned reader might rashly conclude from p. 85 that there was a commission of *nisi prius*. The equitable remedy of "sequestration" is much older than *Coulston* v. *Gardiner* (p. 135, n.). The two distinct writs of *levari facias* (not abolished till 1883) and *fieri facias* have been telescoped on p. 181. The position of the "private prosecutor" (p. 341) is made to resemble too much the position of the civil plaintiff; for the former cannot withdraw his charge without the leave of the Court. Finally, the Act of Settlement did not lay it down that the judges should "only" be removable on the presentation of an Address from the Houses. But these are small blemishes in an admirable book.

EDWARD JENKS.

RENVOI IN MODERN ENGLISH LAW. By the late ALBRECHT MENDELSSOHN-BARTHOLDY, LL.D. Edited by G. C. CHESHIRE, D.C.L., Oxford. At the Clarendon Press. Humphrey Milford. **5s.**

The question of renvoi has been one of the favourite battlegrounds of legal theorists during the past fifty years. In spite of the forbidding bulk of literature on this subject the late Professor Mendelssohn-Bartholdy has been able to add some arguments of force and originality. This in itself is an achievement. At the time of the author's death the manuscript had not been finally prepared for publication. But thanks to the careful editing of Dr. Cheshire the personal qualities of style and the continuity of thought have been fully preserved.

The first part of the book is mainly occupied by a discussion of the leading authorities *Re Annesley*, *Re Ross*, and *Re Askew*. The analysis of these decisions is divided into two stages. The first covers questions arising prior to the application of foreign law. Here English law was uniformly applied in all three cases on points of procedure, of qualification and interpretation. The second stage raises the crucial question whether the direction to apply foreign law comprises not only the internal or municipal law but also the conflict of laws of the foreign law. Differing from the prevailing opinion the author finds that *Re Annesley* and *Re Askew* do not support renvoi in the above sense. As regards *Re Annesley*, this conclusion is reached by placing emphasis on the well-known dictum in which Russell, J., expressed his personal preference for the direct application of foreign municipal law rather than on the *ratio decidendi* which arrived at the same result over a more lengthy route. As regards *Re Askew*, the author seems strongly impressed with what Dean Falconbridge described as Maugham, J.'s, "ingenious explanation of the so-called renvoi" in terms of the foreign right theory. However, since Professor Cook's brilliant demonstration of the interdependence of the foreign right and the renvoi theories, this explanation cannot prevent the conclusion that *Re Askew* was decided on the basis of construing the reference to foreign law as including the attitude adopted by foreign courts to questions of Private International Law. Since the author directs his argument against renvoi in its widest sense, it is difficult to see why *Re Ross* is singled out for attack. As the first of his objections against renvoi the author states that the conflict of factual connections, which might follow upon the application of foreign Private International Law, might make it impossible to give any decision at all. But it would seem that conflicts of factual connections, although they illustrate the complications which may arise through renvoi, are no more or less indissoluble than conflicts

of conflicts of laws. A valuable addition to the list of arguments against renvoi is made by stating in a concrete form the familiar objection that renvoi involves surrender of sovereignty. ". . . under the doctrine of renvoi as applied in *Re Ross*, the English court, in acting as a substitute for the foreign court, would have to accept its method of dispensing justice, its material rules of procedure, and its general moral and political standards as well as an isolated statutory provision or precedent on renvoi like art. 27 (of the Introductory Law to the German Civil Code) or the *Forgo Case*. Would the doctrine of renvoi survive that?" But this point is pressed too far on p. 43, n. 1. The difficulties attendant upon the ascertainment and interpretation of foreign conflict of laws are also present in the case of foreign internal law.

The author next deals with the question whether *Re Ross* has been followed in subsequent decisions. At this stage it might have been useful to state explicitly that the problem of renvoi is not confined to cases in which a foreign law has to be applied qua *lex domicilii*. A similar omission in Dr. Cheshire's treatise[1] has occasioned much doubt in the minds of students, and these doubts are not dispelled by Professor Mendelssohn-Bartholdy's approach to the subject as one concerning the construction of the term "the law of the domicil." The only indication of the correct position up to this point is hidden in a footnote on p. 20, where the renvoi from the foreign *lex situs* in *Re Ross* is mentioned.

To show, as the author sets out to do, that *Re Ross* can no longer be considered as good law, it would be necessary to adduce cases in which the courts refused to consider the reference to a foreign *lex domicilii* as including the conflict of laws of the *lex domicilii*. Short of that one might expect to find cases in which the application of foreign Private International Law instead of foreign municipal law would have led to a different result. The authorities discussed, representing a rather haphazard collection of recent leading cases on various branches of Private International Law, go, however, no further than to show that the possibility of applying foreign conflict of laws was not even discussed by the court.

Much more convincing are the conclusions reached after examination of the authorities relied on in *Re Ross*. The author agrees with Dean Falconbridge that *Collier* v. *Rivaz* cannot be described as a satisfactory authority in favour of renvoi. A lucid analysis of Sir Herbert Jenner's judgment enables him to attribute new meaning to the famous formula "The Court sitting here decides . . . as it would if sitting in Belgium." It is, however, of interest that six years later the same judge delivered the judgment in *Frere* v. *Frere*, which, as the author admits, cannot be explained otherwise than on the basis of renvoi. A statement occurring in the discussion of *Collier* v. *Rivaz* should not remain unchallenged. On p. 60, n. 1, the author makes the startling assertion that s. 1 of Lord Kingsdown's Act is "a rule of English municipal law in *favorem negotii*, not a rule of private international law."

In the remainder of the book the author replies to arguments advanced by two distinguished supporters of renvoi, Professor Keith and M. Lepaulle. Although convincing in his argumentation against Professor Keith, the author does not seem to allow for the fact that the equitable justification which Professor Keith puts forward for renvoi might be put to better service as an explanation, at least in part, of the rule of English Private

[1] This refers to the first edition. In the new edition the chapter on renvoi has been renamed: The Meaning of the Expression "The Law of a Country."

International Law which subjects succession to the *lex domicilii*. The controversy with M. Lepaulle seems to reproduce objections anticipated by Kahn. Here again the value of the author's contribution lies in the more concrete form given to the arguments.

Recently Professor Lerebours-Pigeonnière has described renvoi as "une réaction contre un défaut de communauté de droit." Renvoi, it is claimed by its advocates, helps to remedy the injustice resulting from this lack of uniformity, albeit at the sacrifice of logic and principle. Dr. Schoch in an eloquent tribute to the personal and scholarly qualities of Professor Mendelssohn-Bartholdy, which is appended to the editor's preface, testifies that the ideal of international harmony was ever present to his mind. It is a lasting merit of this book to re-state the issue as involving a choice between the facile but deceptive method of realising this ideal offered by renvoi and the more laborious but also more real solution which is outlined in the final passages of the book. This method would proceed with the assistance of comparative law from the ascertainment of points of agreement to the gradual elimination of differences by means of international conventions such as those concluded between the Scandinavian countries.

J. UNGER.

LA VENGEANCE PRIVÉE ET LES FONDEMENTS DU DROIT INTERNATIONAL PUBLIC. By JACQUES LAMBERT. Librairie du Recueil Sirey. Pp. 136. **10 francs.**

NEW COMMONWEALTH MONOGRAPHS

1. **Legal Machinery for Peaceful Change.** By KARL STRUPP. Constable & Co. Pp. 83. **4s. 6d.**
2. **Justice and Equity in the International Sphere.** By Various Authors. Constable & Co. Pp. 59. **4s. 6d.**
3. **The League of Nations and World Order.** By GEORG SCHWARZENBERGER. Constable & Co. Pp. 191. **6s.**

The present twilight of International Law does not dissuade intending authors. Of the four books noted here, M. Lambert's will probably find the most sympathetic audience, since he implies that International Law is not a commodity artificially manufactured by lawyers or publicists. It will be the product of a conviction on the part of the international society that its relations are governed by a binding law. Leagues, police forces, and equity tribunals cannot produce that conviction; they are the manifestations of it. We are ashamed to repeat this platitude, but not all who hope for a better world have realised its truth.

In *La Vengeance Privée* M. Lambert discusses the thesis that the crystallisation of municipal law was the consequence of the gradual elimination of violence and self-help as methods for the settlement of disputes. The author cannot claim novelty for this view, but he imbues it with vivacity by the constant citation of anthropological evidence upon which it rests. Although the title suggests a close analogy between municipal and international law, the essential uniformity in development is rarely stressed, and the reader is left to make his own inferences. The author relies mainly upon Semitic and Germanic civilisations for his material, since they represent diverse types without any appreciable influence upon each other. Generalisations deduced from such a study are more likely to possess universality. It should therefore be possible to discover in what circumstances violence is supplanted by the rule of law. There are, of course, those who insist that violence is a salutary form of

therapeutic blood-letting, and that virility depends upon the retention of it. Curiously enough, this view is not confined to semi-literate Machiavellian politicians and over-literate Hegelian philosophers. Anthropology has led Sir Arthur Keith to this same strange conclusion. One would have thought that the continued existence of national societies was sufficient to refute this extravagance. There must be few, however, who will hesitate to attach themselves to those "qui sachent que l'Europe ne vivra que par le développement du droit." That knowledge is reinforced by M. Lambert's careful analysis of the development of municipal law from its remotest origins to its present unquestioned sway. The only check on a too exuberant belief in salvation by means of this process is that the modern international society may not survive its present policy of slowing down the process to a scarcely perceptible crawl.

If M. Lambert is a little pedestrian in his timorous treatment of what appears to be a valid analogy, Prof. Strupp soars into an empyrean of blithe disregard for the present condition of International Law. In his monograph he formulates a draft charter for the establishment of an international equity tribunal which he predicts for the year 193—? (Only two more years to go, Professor Strupp.) Interesting mental exercise as such study may provide, it seems to us unreal as many studies on international institutions, the basis of which is not sufficiently examined.

In *Justice and Equity in the International Sphere* the authors refrain from any considerable feat of levitation. They are, in the main, concerned with our experience of international or quasi-international tribunals in the application of distributive justice. Prof. Smith deals with the work of the American Supreme Court in the settlement of inter-state disputes; Prof. de Bustamante describes the brief history of the Central American Court of Justice; Prof. Bentwich examines the role of equity in the jurisdiction of the Judicial Committee of the Privy Council, and breathes the devout hope that our "far-flung Empire" (his cliché, not ours) may yet provide the world with its first example of a successful international tribunal. Professor Radbruch discusses the philosophical implications of equity, and the Rev. D. Maclean discloses that Christianity would solve all our problems.

Dr. Schwarzenberger deals with an institution which as a factor in the present world-situation is as beautiful and as sad and as effective as the snows of yester-year. He concludes that the only successful League would be a universal League, and such an organisation will flourish only in a society which recognises the necessity for sacrificing the individual to the collective interest. In the absence of all other motives, it may be fear which will produce this realisation.

These critical remarks are not intended to asperse the quality of these works. Considered in divorce from the contemporary political context they represent dexterous discussion and interesting argument. It is, however, this abstraction from reality which is so dangerous to the cause of law in the international sphere. We are not among those who take a narrow view of the lawyer's functions, but too much harm has already been inflicted on international law by the multiplication of neglected institutions and unobserved treaties. Anything which promotes the divergence between law and practice heaps discredit on the law. For this reason we believe that at the moment even the most idealistic of lawyers will best serve the cause of international order by the adoption of a more realistic method of research.

J. GOLD.

THE LAW OF DAMAGES. By Frank Gahan, M.A., B.C.L., LL.B. London: Sweet & Maxwell Ltd. 242 + lxxx pp. **15s.**

The impression left by Mr. Gahan's book is that the author has fallen between two stools. His aim, as declared in the preface, was to write a general outline of the subject for students and yet to cite all the cases which a practitioner might like to consider. There can be no doubt of the value of the book to a practitioner who wants a handy and reliable guide to the law of damages. As a student's text-book it suffers from a paucity of discussion. It is very doubtful whether the method of codifying the law with notes on the various articles and a plethora of references to decided cases is suitable for a student's book.

The difficult and controversial question of remoteness of damage receives scanty treatment; there are scattered references to *Liebosch Dredger* v. *S.S. Edison* and *The Arpad*, but no comprehensive discussion of the underlying principles. The author offers no guidance on the true measure of damages where a claim is framed alternatively in contract and in tort.

Another matter which seems to have been overlooked is the question of overlapping in the awards of damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and under Lord Campbell's Act.

It is to be hoped that the author may find it possible in subsequent editions to modify the form of the book so that students may reap the full benefit of his clear and lucid exposition.

E. Wyndham White.

PRINCIPLES OF LAND REGISTRATION. By Sir John Stewart-Wallace, C.B. London: Stevens & Sons Ltd., 1937. Pp. viii and 93. **5s.**

This book is based on lectures delivered by the author, the Chief Land Registrar, to the Institute of Bankers. It is frankly propagandist in character and discusses little more than the advantages of land registration and certain questions likely to be of particular interest to bankers. To lawyers and those interested in legal reform the most interesting chapter is that on maps and plans, in which the learned author states that the practice of the Registry has shown that although plans of each registered property are virtually essential, accurate and up-to-date general ordnance maps are not necessary. This is most important, as the absence of such ordnance maps has often been regarded as the chief obstacle in the way of extending the area of registration. On the other hand, in a chapter on the Land Charges Register it is pointed out that the absence of such maps makes it impossible for land charges to be registered against parcels of land instead of against the names of landowners. The present system is fast becoming unworkable, and, as Mr. A. H. Withers prophesied in 1926, the Land Charges Act will in time make land registration essential. It is a pity that legal writers cannot accept this position and concentrate on writing books which, instead of containing propaganda either for or against registration, are designed to familiarise practitioners and students with its principles—a good elementary textbook for students being particularly needed.

L. C. B. Gower.

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